



2007

## **Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy**

Cornelia T. Pillard

*Georgetown University Law Center*, [pillardn@law.georgetown.edu](mailto:pillardn@law.georgetown.edu)

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56 Emory L.J. 941-991 (2007)

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February 2010

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Cornelia T. Pillard

Professor of Law  
Georgetown University Law Center  
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## OUR OTHER REPRODUCTIVE CHOICES: EQUALITY IN SEX EDUCATION, CONTRACEPTIVE ACCESS, AND WORK- FAMILY POLICY

*Cornelia T.L. Pillard\**

Reproductive rights are traditionally understood to be protected by the privacy aspect of the due process liberty guarantee, but equal protection is also at the heart of the matter. Many of us intuitively know the close relationship between sex equality and abortion rights, and the law, too, is starting to reflect it. This Symposium broadens the focus of traditional abortion-rights jurisprudence to develop equality-based analyses of abortion rights. Widening the angle even further, this Article looks at sex equality and reproductive rights issues beyond the core right to abortion.

Bringing into the picture issues beyond abortion helps to show the close and mutually reinforcing relationship between sex equality and reproductive rights. In fuller context, we see how reproductive rights are a hinge pin between liberty and equality: Women need practical access to a range of reproductive choices to enjoy sex equality, yet they need equality to make reproductive decisions freely and in ways that are responsible to themselves, those they love, and the broader society. Even with the abortion right protected under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, sex inequality and discrimination make that right alone inadequate to secure reproductive choice equally for all women—young and mature, poor and rich, rural and urban.<sup>1</sup> Making law's existing promise of reproductive freedom effective for more women is a critical part of securing it in years to come.

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\* Professor of Law, Georgetown University Law Center. I am grateful to Helen Alvare, Ederlina Co, David D. Cole, Anne Dailey, Reva Seigel, and Robin West for their comments on drafts of this Article.

<sup>1</sup> See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Angela Hooten, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59, 60, 86 (2005); Deborah L. Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy*, 1 S. CAL. REV. L. & WOMEN'S STUD. 99, 99-100, 127-31 (1992); Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349, 365-66 (1994) (highlighting limitations imposed on reproductive choice by geographic as well as financial obstacles to abortion).

Paradoxically, while reproductive rights should be doubly constitutionally protected by the overlapping liberty and equality guarantees, that dual pedigree can instead leave reproductive rights more vulnerable. Arguments from equality may be weakened by the sense that laws and policies need not change to be fairer to women if, supplied with the liberty to control fertility and have abortions, women thereby become “just like men.” Meanwhile, to the extent that reproductive rights are important because they advance sex equality, support for abortion and other reproductive rights can be deflected into efforts to make society more equal in other ways for women, including women with children. We must eschew that shell game because the truth is that reproductive rights are important *both* for the reasons that the Constitution recognizes liberty rights to privacy and bodily integrity *and* for the reasons that it recognizes the right to sex equality.

To highlight some of the opportunities created by bringing equality analysis more fully into the mix, this Article looks at three distinct, reproduction-related sites of sex discrimination: sex-role stereotyping in sex education, insurance policy exclusions of women’s contraceptive health care, and shortfalls in work-family policies in our historically male-oriented labor market. The sex education discussion in Part I criticizes abstinence-only-until-marriage sex education curricula. It brings into focus those curricula’s persistent, official promulgation of retrogressive, anti-egalitarian sexual ideologies—of male pleasure and female shame, male recreation and female responsibility, male agency and female passivity, and male personhood and female parenthood. I argue for a counter-stereotyping sex education that affirms women’s and men’s desire, sexual agency, and responsibility. The same principles that presumptively forbid other kinds of sex-based official action should prevent public schools from training students in accordance with double standards and stereotyping—training that also impairs reproductive justice.

Part II, on contraceptive equity, illuminates the persistence of conflicting legal approaches in equality law to women’s capacity to become pregnant: One sees pregnancy as an incidental, gender-neutral fact about some people that can be disfavored without raising equality problems, whereas the other comprehends discrimination based on reproductive distinctiveness as a core, constitutive aspect of sex inequality. The law should clearly affirm women’s right to use contraception to control when and whether they become pregnant as an indispensable element of sex equality.

Finally, the work-family discussion identifies the lack of realistic opportunities to both nurture children and work for pay as a major concern for sex equality and reproductive rights. At its best, equality law would seek to minimize the extent to which social policy on work and family limits women's full economic and political citizenship and men's relationships of care for children and other dependents. Each of these three issues presents concrete and critical opportunities for deploying equality law and egalitarian cultural norms in support of reproductive justice.

Defining reproductive rights broadly to include issues like sex education, contraceptive access, and work-family policy is necessary because the unwantedness of a pregnancy and the demand for abortion do not occur in a vacuum. Various forms of inequality and stereotyping contribute to a status quo in which many women get pregnant in circumstances in which they either do not want children, or want children yet feel they cannot have them. Girls and women disproportionately are taught to be in denial about their own sexual urges, and yet rely inappropriately on their sex appeal. The denial occurs both ways: Women are expected to deny the presence of their sexual desire (to guard chastity), and to deny its absence (to be sexually responsive to men). In a world in which such denial is the norm, women will lack the kind of agency and responsibility needed to meet their own desires for pleasure, well-being, support, and meaning in their lives. When the vast majority of women are (hetero)sexually active, yet women-controlled contraception is not recognized as a basic component of health care, it should not be surprising that millions of women face unwanted pregnancies. Society tolerates unbridled and even aggressive male sexuality as "natural" or lauds it as strong. Society valorizes lack of female desire, even while considering that lack inevitable, and so irrelevant, when women's lack of desire does not match male wants. People generally still view child rearing as women's gratification and their domain, and accept men's failure to do and value it as personal, private choice, off-limits to criticism. Both abstinence-only sex education and insurance noncoverage of contraception help to sustain that status quo. If those circumstances do not change, men will continue to fail to take their part of the responsibility for sexual intercourse and its potentially lifelong consequences, and women will continue to accede to sex inequality structured around and rationalized in terms of reproduction.

Reproductive choice is not only about avoiding unwanted pregnancy, but also about having wanted children. The paucity of family-friendly workplace policy in the United States is a major issue, not only of sex equality, but also of

reproductive rights. People who might want children should not be forced to choose between nurturing a family and earning the income needed to support it. Our law, institutional arrangements, and culture need to be restyled so that mothers are not routinely “mommy tracked,” men are prompted to share in caretaking, and workplace and social-welfare policies support women and men equally to realize their potential at home and work. The failures of our law, policy, and culture to do more to enable women and men alike to be both direct caregivers and successful working people interferes with genuine reproductive choice—and sex equality—for all.

The broader focus advocated here also seeks common cause between people opposed to legal abortion and those who support the abortion right. Importantly, in each of the three areas explored in this Article, the life of the fetus—the crux of the moral controversy over abortion—is not implicated. In each area, if society were more willing to recognize the demands of equality, there might well be less need for abortion. Equality analysis can help to encourage sexual agency and responsibility, facilitate access to contraceptives for both sexes, and make parenting more attractive than abortion by making it less impoverishing and disempowering for women and a greater priority for men. Abortion opponents and advocates alike should favor extending sex equality norms in these and related areas.<sup>2</sup>

It makes sense to view equality law as a source of support for reproductive rights in part because, while abortion rights in the United States have been rolled back since the 1980s, the law of sex equality has gained momentum here and abroad. Equality law has coalesced around a vision of women and men equally entitled to pursue chosen goals with respect to education, work, intimacy, and family, and equally obligated to shoulder the duties that our citizenship and our actions incur. Equal protection’s basic commitment to the principle that biology need not determine destiny means that women (and men) must have equal life chances even though the sexes are biologically distinct. In particular, equality law increasingly apprehends the central role that both expectations about maternity and the realities of parenting play in sex discrimination. The legal project of enabling women and men freely to chart life courses without systematic, sex-based constraint confronts a long history and culture of traditional domesticity, which casts women primarily as mothers

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<sup>2</sup> Equality analysis may also support the abortion right itself for many of the same reasons set forth here, but elaborating that argument in the specific context of abortion is beyond the scope of this Article. Such analysis presumably would reinforce the abortion right and accommodate exceedingly persuasive governmental interests in maternal health and fetal life.

and family caretakers, and men primarily as breadwinners unfettered by direct family-care responsibilities. Courts and legislatures have shown some initiative in breaking down the sex-based “maternal wall” that has cabined women’s progress in the labor market, and have begun to hint at how the law needs to open the way for men and women better to share responsibilities at home. Under the legally dominant, modern vision of sex equality, individuals may agree to live out their own sexuality or sex roles in ways that might strike others as stereotypical, traditional, innovative, or even radical. The law, however, assumes and protects the equal rights and opportunities of women and men by working to foster and assure official neutrality and to repudiate a decidedly nonneutral legal history regarding the roles that members of either sex might play in sexuality, work, and family.

It is not just because equality rights are strong and abortion rights are under attack that it makes sense for reproductive rights advocates to turn to equal protection, but also because sex equality is fundamentally at stake in controversies over reproductive law and policy. Reproductive rights, including the rights to contraception and abortion, play a central role in freeing women from historically routine conscription into maternity. It is reproductive rights that have begun to allow women to decide whether and when to follow the path of motherhood. Our Constitution declares our liberty to protect our own life and health. As a society we have the knowledge to educate young people about reproduction, the means to prevent and in some circumstances to end unwanted pregnancies, and the social resources to support parenting. At this point in our history, women’s equality is infringed when such reproductive freedoms are denied without forceful governmental justification.

The turn to equality found some impetus in the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>3</sup> *Casey* recognized that women’s ability “to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>4</sup> In reaffirming the core of the abortion right recognized in *Roe v. Wade*,<sup>5</sup> *Casey* linked the abortion right to the constitutional prohibition against government

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<sup>3</sup> 505 U.S. 833 (1992) (joint opinion of Justices O’Connor, Souter, and Kennedy, joined in relevant part by Justices Blackmun and Stevens). In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), decided as this issue went to press, the four dissenting justices emphasized that abortion rights claims “center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.” *Id.* at 1641 (Ginsburg, J., dissenting). The *Carhart* majority opinion did not discuss the equality implications of abortion rights.

<sup>4</sup> *Casey*, 505 U.S. at 835.

<sup>5</sup> 410 U.S. 113 (1973).

assigning women the traditional, gendered social roles of wife and mother—a prohibition that is increasingly understood to lie at the heart of equal protection.<sup>6</sup> Under abortion laws,

the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law . . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.<sup>7</sup>

Antiabortion laws and other restraints on reproductive freedom not only enforce women's incubation of unwanted pregnancies, but also prescribe a "vision of the woman's role" as mother and caretaker of children in a way that is at odds with equal protection.

Although the Court's recognition of the connection between equality and reproductive rights has been incipient and fragile, equality is a natural conceptual partner to liberty in support of reproductive choice. Renewed attacks on abortion have turned attention to how the Equal Protection Clause, and the right to sex equality more generally, might advance reproductive self-determination. Controversy and conflict about abortion has also led some of us to seek new areas of agreement and better ways to move forward together. The turn to equality, properly understood, has the potential to do more than provide an alternative defense of reproductive rights; it brings into the open a truth that millions have experienced, which is that reproductive rights really are fundamentally about sex equality. Equality analysis offers promising avenues to enlist more support for the project of making reproductive justice, and the sex equality it underwrites, a reality for all.

#### I. SEX EDUCATION: THE EQUALITY RIGHT AGAINST INCULCATION OF SEX-BASED DOUBLE STANDARDS

Sex education lies at the crossroads between reproductive rights and sex equality. It is at once about sexuality (feelings and actions relating to "having sex"), sex (being anatomically male or female), and gender (the cultural meanings associated with maleness and femaleness). Sex education is a critical site of acculturation regarding both reproduction and sex roles. Tinkering with sex education is risky business because of our deep, passionate,

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<sup>6</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730–31 (2003).

<sup>7</sup> *Casey*, 505 U.S. at 852.



personal, and powerfully conflicting norms on those matters,<sup>8</sup> and because sex can be a source of danger as well as pleasure.<sup>9</sup> Because sex education's very purpose is to affect young people's understandings and behavior, however, it provides an opportunity for change.<sup>10</sup>

The new trend in sex education in the United States is away from comprehensive sex education and toward abstinence-only-until-marriage curricula, which advocate that refraining from sexual activity until heterosexual marriage is the sole acceptable form of sexual behavior. Those curricula include only negative information about birth control and abortion, such as contraceptive failure rates and assertions of adverse health consequences of abortion. They omit the fuller information traditionally provided in comprehensive sex education on the ground that it tacitly encourages premarital teen sex, which abstinence-only proponents view as immoral and harmful. Abstinence-only curricula receive large and growing blocks of federal funding and are already taught in one third of America's sex education classrooms.<sup>11</sup> Progressives criticize abstinence-only programs as

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<sup>8</sup> See generally JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES (2004); KRISTIN LUKER, WHEN SEX GOES TO SCHOOL, WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES (2006); Sharon Lerner, *The Sex-Ed Divide*, AM. PROSPECT, Sept. 24, 2001, at A15.

<sup>9</sup> See generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (decrying the reality of pervasive rape, incest, and other forms of sexual abuse perpetrated by men against women); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 149 (1989) (arguing that patriarchy is expressed and maintained through sexualized dominance); Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y.L. SCH. L. REV. 289 (1993) (describing the conundrum posed by feminists' appreciation that sex can both pose danger and promise pleasure to women).

<sup>10</sup> The intensity of the controversy over sex education might seem disproportionate to the stakes because sex education in schools is only a fragment of the information and socialization that influences young people's approaches to sex and gender. Given the volume and complexity of other influences, exactly what is taught in sex education class may matter less than we think. Those limitations must qualify my own claims as well. The relationship between legal and cultural change is complex, and by focusing on the former, I do not mean to imply otherwise. Nonetheless, the fact that sex education in the public schools is such a "hot button" issue suggests that people pay special attention to authoritative, public positions on sex, gender, and youth. Sex education in public school remains vitally important because schools are one of the few places where constitutional equality norms *can* be brought to bear directly to help young people to get fair and accurate information about sex.

<sup>11</sup> Three major sources of funding for abstinence-only curricula are: (1) the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, 42 U.S.C. § 710(b) (2000) (providing funding to states for abstinence-only curricula), (2) Special Programs of Regional and National Significance/Community-Based Abstinence Education (SPRANS/CBAE), see U.S. Department of Health and Human Services, Administration for Children and Families, Fact Sheet: Community-Based Abstinence Education Program, <http://www.acf.hhs.gov/programs/fysb/content/abstinence/community.htm> (last visited Nov. 29, 2006) (providing funding directly to community organization for abstinence-only programs, funded by the FY 2005

inaccurate and as counterproductive in avoiding unwanted pregnancy and sexually transmitted disease,<sup>12</sup> but scholars and advocates have paid inadequate attention to those curricula's propagation of sex stereotypes and double standards.

The abstinence-only approach is permeated with stereotyped messages and sex-based double standards about acceptable male and female sexual behavior and appropriate social roles. Public school teaching of gender stereotypes violates the constitutional bar against sex stereotyping and is vulnerable to equal protection challenge. The equality defect is also related to the more vocal objections that abstinence-only curricula are ineffective: Teaching sex-stereotyped behavior undermines the shared sense of agency and responsibility that young people need to avoid coerced or unwanted sex, unplanned and unprotected sex, and unwanted pregnancy.

The Supreme Court's recent equal protection jurisprudence sets a very high bar against sex-based stereotyping and overgeneralization. Under a line of cases culminating in *United States v. Virginia (VMJ)*,<sup>13</sup> even statistically accurate generalizations about "typically male or female tendencies"—such as men's greater aggressiveness versus women's comparatively more cooperative temperament, or men's tendency to harass and women's victimization by sex harassment—cannot be grounds for official, sex-based discrimination.<sup>14</sup> *VMJ* builds on a long line of precedent that treats even laws enacted ostensibly to favor or protect women as unconstitutionally discriminatory due in large part to the stereotypes they perpetuate. The doctrine often seems more centrally concerned with the metastatic potential of sex-role stereotyping that sex-based disparate treatment reflects and reinforces than with the often benign or minimal concrete differences in treatment themselves. It thus recognizes that sex-role stereotyping is itself harmful because it projects patriarchal messages that make discrimination at once more likely and less apparent.

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appropriations bill and administered under the authority of PRWORA by the Department of Health and Human Services), and (3) the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z (2000). These sources account for \$167 million budgeted for 2005. See H.R. COMM. ON GOV'T REFORM, 108TH CONG., THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 1-4 (Comm. Print 2004), available at <http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf> (prepared for Rep. Henry A. Waxman) (describing extent of funding for and adoption of those curricula).

<sup>12</sup> LUKER, *supra* note 8, at 238.

<sup>13</sup> 518 U.S. 515 (1996).

<sup>14</sup> *Id.* at 541, 544, 550.

Constitutional resistance to stereotyping springs from equal protection values of fair treatment of people as individuals, opposition to systemic gender hierarchy, and the pragmatic challenges of breaking down patriarchy and reimagining a society without it. Given the vast overlap between women's and men's characteristics, as well as the wide range within each sex, individuals' actual qualities very often are gender atypical (although our own confirmation biases may make that harder to notice). When government acts in ways that routinely deny that reality, it disrespects our individual humanity. Equal protection opposes sex-based disregard of individual qualities in part because that disregard reinforces historically entrenched gender hierarchy. Stereotyping makes patterns of inequality seem more natural, inevitable, and even invisible. A history of imaginations and opportunities circumscribed by perceptions of "average" or "typical" male versus female sex characteristics, and habits of exaggerating the relevance and scope of sex differences, are part of the architecture of patriarchal systems. Antistereotyping doctrine helps to break those habits to permit us to move beyond that history.

It may yet seem perverse that equal protection doctrine goes to so much trouble to resist factually based generalizations about the sexes when they are, by and large, accurate. Why do the Supreme Court cases insist so firmly on the possibility of gender atypicality? One function of antistereotyping doctrine's special protection of space for gender atypicality is to help to deal with challenges posed for sex equality theory by the social construction of gender. We are all powerfully socialized to replicate current gender arrangements and to accept them as "natural." The remarkable human adaptability even to onerous and unjust circumstances, meanwhile, blunts our antennae for inequality.<sup>15</sup> Those well-documented phenomena—gender socialization and adaptive preferences—combine to make it difficult to anticipate what sex equality will look like, and consequently to know quite how best to seek it. Gender atypicality is thus especially important and liberating in helping us to experience and envision the possibilities; antistereotyping doctrine is its legal protection.

Despite its strong support in recent constitutional doctrine, however, the antistereotyping theory is also in tension with one older equal protection precedent on regulation of teenage sexuality. A plurality of the Supreme Court

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<sup>15</sup> See, e.g., JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109–40 (1983); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131, 1138–39, 1146–48 (1986).

in *Michael M. v. Superior Court of Sonoma County* sustained a California law criminalizing men's but not women's participation in "statutory rape"—i.e., intercourse with a minor.<sup>16</sup> The statute and the Court's opinion relied on and reinforced the very stereotypes of women's passivity and men's agency in sex that I argue the Constitution rejects. The opinion justified the statute's applicability only to men on the ground that "males alone can physiologically cause the result which the law properly seeks to avoid,"<sup>17</sup> even though as Justice Stevens pointed out in dissent, "the risk-creating conduct that this statute is designed to prevent requires the participation of two persons—one male and one female."<sup>18</sup> The plurality also embraced the double standard that women's chastity, more than men's, should be an object of governmental solicitude. Underage sex is distinctively a "problem" for women, the opinion suggested,<sup>19</sup> and accepted that some legislators were seeking to protect "young females [but not males] from . . . the loss of chastity."<sup>20</sup> The state's post-hoc assertion of an interest in exempting girls to encourage them to report violations is constitutionally offensive in its assignment of a sexual gatekeeper function to girls only. Under *Michael M.*, girls, and not boys, qualify as "sex police," without regard to their actual level of responsibility in a violation.<sup>21</sup>

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<sup>16</sup> 450 U.S. 464 (1981) (plurality).

<sup>17</sup> *Id.* at 467 (internal quotation marks omitted).

<sup>18</sup> *Id.* at 500 (Stevens, J., dissenting).

<sup>19</sup> *Id.* at 469 (plurality) ("[A] legislature may provide for the special problems of women.") (internal quotation marks omitted).

<sup>20</sup> *Id.* at 470 (internal quotation marks omitted). The plurality accepted the state's asserted interest in pregnancy prevention without evidence of any relative ineffectiveness of sex-neutral statutory rape laws, which equally prohibit women from seducing young and naïve men. The plurality tellingly concluded that the California law "reasonably reflects the fact that the consequences of *sexual intercourse and pregnancy* fall more heavily on the female than on the male." *Id.* at 476; *see also id.* at 479 (Stewart, J., concurring) (referring to sexes being differently situated with respect to "*intercourse and pregnancy*") (emphases added). Those justices apparently viewed intercourse as a problem for underage women, even apart from unwanted pregnancy, because they understood it to impugn women's virtue in a way that it did not for their male peers.

<sup>21</sup> For all its discussion of protecting young women, *Michael M.* implicitly underscores the law's inadequacy in protecting women who "ask for it." Women's well-founded fear that they will be branded as licentious and will not be believed is a much larger deterrent to the reporting of sex offenses than is any risk of prosecution under sex-neutral statutory rape laws. Prosecutors rely on statutory rape laws in part as alternatives to full-blown rape charges where lack of consent may be hard to prove. In *Michael M.*, the apparent difficulty with the rape charge was that Sharon (age 17) initially walked down the railroad tracks with the defendant (age 18), lay on a bench with him and willingly kissed him. When she told him to stop and tried to get up, he slugged her in the face two or three times, pushed her down on the bench and proceeded to force his penis into her vagina anyway. *See* 450 U.S. at 483 and n.\* (Blackman, J., concurring in the judgment) (testimony from preliminary hearing). Perhaps it was because her initial conduct seemed so horny (or "slutty," as the sexual double standard would have it) that prosecutors thought a jury would find her effectively ineligible to say "no" to intercourse. The case was tried as statutory rape, to which consent is deemed irrelevant. The sexual double standards that *Michael M.* helps to sustain are themselves factors in the

Constitutional analysis of stereotyping in sex education pits *VMI*'s aspirational egalitarianism against *Michael M.*'s more fearful gender protectionism; whether through narrow construction or overruling of *Michael M.*, it is the antistereotyping principle of *VMI* that should apply. The double standards about sexuality and sex roles in abstinence-only education are as widespread and harmful as those the Court has confidently rejected in the whole line of antistereotyping cases. Men's lust has long been stereotyped as a powerful, natural force, and male virility celebrated, whereas women have been characterized as the objects of men's desires rather than subjects of their own. Women who express their sexual desire have historically been denigrated as dirty, threatening "sluts" or "whores," and women who have sex outside of marriage have been typed as "fallen," "ruined," "damaged," not "good girls," or "not marriage material"—terms simply not used against sexually active young men. Historically, men have been thought to have a primitive sexuality "that constantly [seeks] outlet," in contrast to women's "more civilized, contingent sexuality that [can] be subordinated to the needs of both family and society."<sup>22</sup> Traditionally, sex could be a source of pleasure and power for men; for women it has been associated with risk and shame. Public schools have a constitutional responsibility to avoid inculcating students with those harmful stereotypes.

The reproductive-rights stakes in sex education are significant. The choice between a stereotyped and an egalitarian path can influence whether women and men learn to deal with one another as equals and take responsibility for sexuality and procreative capacity, or whether they live out existing sexual double standards that help to foster, among other ills, sexual coercion and high rates of unwanted pregnancy. Sexual double standards set up both young women and men to act irresponsibly. The notion that male sex drives are irrepressible, the valorization of male sexual "conquests," and the failure to hold men accountable to care for the children they father all encourage heedless and even lawless male sexual behavior, destructive male-to-male peer pressure, and disregard of women's humanity.<sup>23</sup> Relying on young women to

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underenforcement of rape and sexual abuse laws. The antidote to that rests not in exempting females from legal sanctions, but in rejecting the culture of disparate shaming of females about sex, and, more generally, in reforms that decrease the extent to which women remain beholden to the men who coerce them.

<sup>22</sup> LUKER, *supra* note 8, at 56.

<sup>23</sup> Abetting unwanted impregnation of women is not the only way that sex role stereotypes harmfully implicate men. Stereotyping is itself insulting and limiting for men, cabining them into restrictive roles and stigmatizing those who stray from masculine gender norms. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24 (theorizing patriarchy as a system of "male

be the gatekeepers of chastity and to respond with denial and shame to their own sexual drives, touting motherhood as their best destiny, and encouraging women to care more about their relationships with men than their own plans intensify women's ambivalence and difficulty in negotiating their own drives, desires, and best interests.<sup>24</sup> Failure to acknowledge women's very real and powerful sexual urges also abets sexual abuse and rape: If women are taught to deny their desire, their "no's" appear ambiguous, making it easier for men to believe that "no means yes"—i.e., that male insistence will merely lead to what both "really" want. The female chastity norm also punishes women who repudiate it—or are presumed to do so—by viewing them as "fair game," disentitled to protection from uninvited sex. That negative implication is deeply racialized: Black women and other women of color, who are considered promiscuous by nature and thus ineligible for the chastity pedestal, have consistently been unprotected or underprotected against sexual abuse.<sup>25</sup>

It is not an option in sex education to say nothing about sex stereotypes. Gender and sex roles have become pervasive topics, both implicitly and explicitly, in sex education curricula. Historically, basic sex education taught students about the fundamentals of human sexuality, including menstruation, the reproductive process, and, increasingly, the avoidance of unwanted pregnancy and disease.<sup>26</sup> Sex education in the United States has moved beyond those anatomical basics, however, as schools have responded to students' need for guidance on how to navigate the social, emotional, and ethical shoals of sex and sexuality.<sup>27</sup> Sex education that discusses such matters inevitably also addresses gender roles. Once that door is open, either traditional gender roles are accepted and reinforced, or the risks of stereotyping must be made explicit and restrictive social generalizations about men and women challenged.

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distrust and fear of other men" that valorizes men's control and domination of other men); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995) (arguing that "[t]he man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so"). And men, too, are victims of the kinds of sexual aggression that patriarchal cultures foster. See Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 52 (2004).

<sup>24</sup> See Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29, 30–43 (1988); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182–83, 206–08 (2001); see also Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 HARV. EDUC. REV. 297 (2006).

<sup>25</sup> See generally Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992).

<sup>26</sup> IRVINE, *supra* note 8; LUKER, *supra* note 8, at 201.

<sup>27</sup> LUKER, *supra* note 8, at 85–86.

As social context has joined the technical details in sex education courses, however, sex education conservatives have mobilized in protest against comprehensive sex education curricula. They have, with organizational effectiveness beyond their numbers, driven sex education toward “traditional values” and have won substantial governmental support for abstinence-only curricula. Sex education conservatives generally believe that women and men should play distinct roles in sexuality, family, and the labor market. For them, females’ chastity is more important than males’; responsibility for guarding chastity is assigned particularly to females; marriage is the only proper venue for sexual intimacy; men’s sex drive and sexual satisfaction is privileged while women’s is demonized or ignored; and childrearing is viewed as primarily women’s responsibility. These ideas are traditional, historically familiar, and often rooted in fundamentalist or other religious beliefs.<sup>28</sup>

Abstinence-only curricula implicitly and explicitly perpetuate the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire. According to popular abstinence-only curricular materials, men have a naturally strong sex drive that women lack, and it is up to women to be the sexual gatekeepers. “A young man’s natural desire for sex is already strong due to testosterone,” one curriculum states; in contrast, women who “fantasize about sex” do so as a result of a regrettable process of having been “culturally conditioned.”<sup>29</sup> One curriculum cautions that “[a] man is usually less discriminating [than a woman] about those to whom he is physically attracted.”<sup>30</sup> The fact that a man might make sexual advances towards a woman does not necessarily mean that he cares for her, abstinence-only materials assert, but perhaps only that he sees her as an outlet for his sex drive.<sup>31</sup> Men, the curricula hint, are only after that “one thing.”<sup>32</sup> Because male sex drive is so unrestrained, “[t]he girl may need to put

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<sup>28</sup> *Id.* at 147, 159, 228.

<sup>29</sup> Sexuality Information and Education Council of the U.S. (SIECUS), No New Money for Abstinence-Only-Until-Marriage Programs, In Their Own Words: What Abstinence-Only-Until-Marriage Programs Say, <http://www.nonewmoney.org/ownWords.html> (last visited Nov. 19, 2006) (quoting COLEEN KELLY MAST, SEX RESPECT: STUDENT WORKBOOK 11 (2001)).

<sup>30</sup> *Id.* (quoting WAIT (WHY AM I TEMPTED) TRAINING, WORKSHOP MANUAL 37 (1998)).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., *id.* (quoting MAST, *supra* note 29, at 94) (teaching that “[a] guy who wants to respect girls is distracted by sexy clothes and remembers her for one thing” and further explaining that men are “turned on by their senses and women by their hearts”). The classic warning to young women that men are “only after one thing” encapsulates in a phrase familiar to millions of people a sexual double standard that weighs females’, but not males’, chastity as more important than their sexual fulfillment. See, e.g., Emily Maguire, *Teenage Kicks*, OBSERVER, Aug. 14, 2005, at 4 (describing author’s self-destructive reactions to her own adolescent sex

the brakes on first to help the boy.”<sup>33</sup> Nowhere are students warned about girls taking advantage of boys for kicks, or told that boys must also take responsibility to help girls restrain their lust.

Double standards about sex drive and chastity in abstinence-only curricula are embedded in a larger picture of women and men playing traditional roles in the family and the public sphere. A decision to practice abstinence until marriage assumes early, heterosexual marriage and early childbearing.<sup>34</sup> The expectation is not that marriage will be delayed until a person’s late twenties or early thirties so that both parents can complete higher education and establish themselves at work, but that couples will marry young and the woman will become a family caretaker, principally supported by her husband, who remains relatively free of care-giving duties to pursue his career. Women, one abstinence-only curriculum teaches, need “financial support,” whereas men need “domestic support” and “admiration.”<sup>35</sup> Another maintains that “[w]omen gauge their happiness and judge their success on their relationships. Men’s happiness and success hinge on their accomplishments.”<sup>36</sup> Young women, according to a leading abstinence-only curriculum, “care less about achievement and their futures” than do their male peers.<sup>37</sup> These curricula suggest that there are two tracks in sex and two tracks in life, one male, and one female.<sup>38</sup>

Because of strong differences of opinion among parents about the appropriateness of abstinence-only versus comprehensive sex education, some schools now offer both and allow students and their families to choose, but this “choice” might itself exacerbate the sex-role stereotypes present within abstinence-only curricula. In a profile of a Minnesota school district’s conflict

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drives in the face of sex education rife with double standards, including that “boys were *only after one thing*, and if you gave them that, you would never see them again”) (emphasis added).

<sup>33</sup> SIECUS, *supra* note 29 (quoting MAUREEN GALLAGHER DURAN, REASONABLE REASONS TO WAIT: STUDENT WORKBOOK 96 (2002)).

<sup>34</sup> It is one thing to remain abstinent until age 18 or 20, and quite another to forswear sex until into one’s thirties or, in the case of persons who do not or legally cannot marry, forever.

<sup>35</sup> COMM. ON GOV’T REFORM, *supra* note 11, at 21 (quoting WAIT TRAINING, *supra* note 30, at 199).

<sup>36</sup> *Id.* at 16 (quoting Why kNOW, ABSTINENCE EDUCATION CURRICULUM 112 (2004)).

<sup>37</sup> *Id.* at 16.

<sup>38</sup> Because sex education has become a political battlefield in the United States, some of the more value-laden messages in sex education policy and curricula are expressed with circumspection. Sex education conservatives say they are seeking a return to the teaching of “traditional values.” Of course, many traditional values—such as personal responsibility, interpersonal and self-respect, honesty and self-discipline, and even the wonder of adult sex in appropriate circumstances—are widely shared, uncontroversial, and appropriately taught in sex education courses. But in debates over sex education, “traditional values” also refers to a very controversial insistence on traditional gender roles. LUKER, *supra* note 8, at 227–28.



over sex education, Sharon Lerner observed a pattern that shows sex-based double standards writ large and institutionally reinforced: The girls disproportionately enroll (or are enrolled by their parents) in abstinence-only curricula, while boys disproportionately are enrolled in the comprehensive classes.<sup>39</sup> Under such self-imposed “tracking,” it is girls especially whom abstinence-only curricula protect from the “corrupting” force of information about sex, whereas boys are not thought to need such protection. Boys are put in charge of the facts, including information about birth control and abortion. Girls, disproportionately enrolled in the abstinence-only curricula, remain ill-informed as they learn only the importance of abstinence until marriage, with no backup plan. They are groomed for their role as sexual gatekeepers and guardians of their own (more important) sexual chastity, even as, compared to their peers who receive a comprehensive sex education, they are left more vulnerable to unintended pregnancy and sexually transmitted disease.<sup>40</sup>

Many abstinence-only curricula were designed and are strongly supported by religious and conservative groups such as Focus on the Family and Concerned Women for America (CWA).<sup>41</sup> These curricula’s views of sex, sexuality, and sex roles closely track the priorities of such supporting organizations. CWA, a powerful abstinence-only proponent, consistently expresses support for “motherhood.” CWA’s advocacy exploits a useful ambiguity in the meaning of that word, referring both to the unassailable fact that women who bear children are mothers and to the traditional, sex-based assignment of women to the social role of primary family caregiver—a role that CWA particularly champions. For example, CWA opposes the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) because it is based on a conviction that, as CWA protests, “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and

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<sup>39</sup> Lerner, *supra* note 8.

<sup>40</sup> On the correlation between abstinence curricula or pledges and risky behavior, see generally Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271, 277 (2005); DOUGLAS KIRBY, NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, SUMMARY: EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 18 (2001), <http://www.teenpregnancy.org/resources/data/pdf/emersumsum.pdf>.

<sup>41</sup> See, e.g., Eva Arlia, Concerned Women for America, Abstinence Education’s Amazing Progress (Nov. 24, 2004), <http://www.cwfa.org/articles/6919/BLI/commentary/index.htm>; Linda Klepaki, Focus on the Family, Sex Education: Article Overview, <http://www.family.org/socialissues/A000000360.cfm> (last visited Feb. 23, 2007).

women.”<sup>42</sup> CWA decries the Convention’s requirement that signatory nations “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices . . . based . . . on stereotyped roles for men and women.”<sup>43</sup> CWA is explicit in its opposition to such change, and in its commitment to win official support for maintenance of sex-stereotyped roles and behavior.

In sum, overt teachings and the pervasive subtext of abstinence-only curricula reflect the expectation that women should and will become mothers, rely on their husbands for financial support, care about their relationships with males more than the males do, have a greater stake in and identification with chastity than men, and do not value the importance of sexual release as highly as men do. By promulgating sexual double standards, those curricula foster a world view and behavior at odds with our equal protection law. Their prescriptions for women and men resonate vividly with the traditional sex roles that were the targets of so many of the early sex equality cases.<sup>44</sup>

If it is contrary to equal protection to make even formally neutral governmental decisions based on sex stereotypes, it would seem, a fortiori, unconstitutional to teach those same views in public schools. There is, however, some doctrinal question whether teaching sex stereotypes is unconstitutional in the absence of an additional exclusion or denial of opportunity based on those stereotypes. If government must not act on the

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<sup>42</sup> Wendy Wright, *CEDAW: A Global Tool That Would Harm Women* (Aug. 27, 2002), <http://www.cwfa.org/articledisplay.asp?id=1871&department=CWA&categoryid=nation> (quoting Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13).

<sup>43</sup> *Id.* (quoting CEDAW, *supra* note 42, at art. 5) (alteration in the original). An online feature on the Focus on the Family web site, another influential proponent of abstinence-only curricula, similarly asserts, for example, that men “are providers,” care more about respect than about love, and “want more sex.” Shaunti Feldhahn, *What I Didn’t Know About Men*, <http://www.family.org/marriage/A000000997.cfm> (last visited Feb. 23, 2007). Understanding how the sexes differ, the feature claims, allows a woman to “better appreciate and support [her husband] in the way that *he* needs.” *Id.* The web site’s advice to women that “[m]en care about appearance,” and that “your man does need to see you making the effort to take care of yourself – and he will take on significant cost or inconvenience in order to support you” sounds uncannily like a recipe for how to succeed as a 1950s housewife.

<sup>44</sup> Stereotypes that women were mothers in charge of family care and men were family breadwinners were the targets in numerous equal protection cases, for example, *Califano v. Goldfarb*, 430 U.S. 199, 204–07 (1977) (invalidating Social Security Act survivors’ benefits scheme paying earnings of a deceased husband to his widow regardless of dependency, but paying earnings of a deceased wife to her widower only if he proved he was receiving at least half of his support from her); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642–45 (1975) (invalidating Social Security Act law granting survivors’ benefits to both widow and minor children of male wage earner but granting such benefits only to minor children and not widower of female wage earner); and *Stanton v. Stanton*, 421 U.S. 7, 14–16 (1975) (invalidating law setting differential ages of majority for girls and boys based on assumption that boys’ professional futures require longer preparation than girls’).

belief that men are aggressive and thus better fit than women for military-style education,<sup>45</sup> women are better mothers,<sup>46</sup> or boys are more likely than girls to drink and drive dangerously,<sup>47</sup> then it should follow that government may not seek to indoctrinate students with those same sex-based generalizations.

Legal protection against sex discrimination is centrally concerned with stigmatic harms—ideological and cultural ideas even apart from concrete acts of denial or exclusion.<sup>48</sup> In the context of racial discrimination, too, the Supreme Court has long underscored the centrality of stigma as an ingredient of the unconstitutionality of policies in areas ranging from education, to juror participation, to voting rights.<sup>49</sup> Under the race cases, government can no more

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<sup>45</sup> *United States v. Virginia*, 518 U.S. 515, 541–45 (1996).

<sup>46</sup> *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729–30 (2003); *Caban v. Mohammed*, 441 U.S. 380, 389 (1979). The Court's decision in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), is not to the contrary. See Nina Pillard, *Plenary Power Underground in Nguyen v. INS: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002) (arguing that *Nguyen's* tolerance of stereotypes about maternal versus paternal ties evidences immigration and nationality concerns).

<sup>47</sup> *Craig v. Boren*, 429 U.S. 190, 200–04 (1976).

<sup>48</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring) (noting the “stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex,” such that “whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (defining the “serious social and personal harms” of “discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes,” which “forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities” and “thereby both deprive[] persons of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life”); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (determining that “the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against,” but that “discrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants in the political community, . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group”); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 785–86 (2002) (opining that it would be constitutionally problematic for a governmental entity to make a pronouncement of sex inequality even if it were “unmoored from direct, binding connection to policy,” such as by declaring “Welcome to Cobb County, Where a Woman's Place Is in the Home”); see also David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1009 (2002) (describing gender as a form of ideology that government is obligated to disestablish by “neither endors[ing] nor disapprov[ing] gender beliefs”).

<sup>49</sup> See *Bush v. Vera*, 517 U.S. 952, 980, 985 (1996) (declaring that “[o]ur Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes” and condemning as “constitutional harm” the racially stereotyping “message” communicated by “the bizarre shape and noncompactness demonstrated by the districts here”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (observing that “[c]lassifications based on race carry a danger of stigmatic harm” and “may only reinforce common stereotypes”); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (“state interest in securing residents from the harmful effects of discrimination” extends “beyond mere physical interests to economic and commercial interests” to encompass “political, social, and moral damage”); R.A. Lenhardt, *Understanding the Mark: Race*,

proclaim white supremacy than it can act on racist views to deny concrete opportunities; a similar bar should be recognized against official sex stereotyping.

To some extent, the terms of judicial intervention to remedy stigmatic harm have been analyzed through the standing doctrine, where standing to challenge policies that communicate racial inferiority has been broadly construed.<sup>50</sup> Even a lack of standing to challenge a stereotyping harm in court would not, however, vitiate the unconstitutionality of government espousing sex-biased views on which it is prohibited from acting.<sup>51</sup> In the final analysis, equality norms should require the adoption of a counter-stereotyping approach to sex education even if those norms are not always judicially enforceable.

The equal protection critique of abstinence-only curricula is strengthened and rendered more amenable to judicial resolution by the fact that sex education classes are designed not only to expose students to ideas, but also to shape student behavior. Obligatory education permeated with discriminatory content alone raises serious constitutional concerns.<sup>52</sup> But the conduct-shaping purpose of sex education curricula makes them vulnerable to equal protection challenge even if communicating retrogressive sex roles in traditional academic classes might not be.

One still might object substantively that it is idealistic blindness to apply antistereotyping principles to sex education. Whether or not the fear of sexual danger so present in *Michael M. v. Superior Court of Sonoma* supported the sex-specific statute in that case, sex can indeed be dangerous, and its potential

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*Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 865 & n. 314 (2004) (concluding that “[i]n the years since the Fourteenth Amendment was enacted, the Court has plainly concluded that the harms imposed by racial stigma lie at the core of the problems of inequality the Fourteenth Amendment was designed to address”); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444 (“Racism is both 100% speech and 100% conduct. Discriminatory conduct is not racist unless it also conveys the message of white supremacy—unless it is interpreted within the culture to advance the structure and ideology of white supremacy.”).

<sup>50</sup> See, e.g., *Mathews*, 465 U.S. at 738–40 (stigmatic, noneconomic injury sufficed to support standing); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (expressly unequal, race-based policy constitutes injury-in-fact for standing purposes, even without denial of a concrete benefit).

<sup>51</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–21 (1978).

<sup>52</sup> The Court in *Brown* observed that education “is a principal instrument in awakening the child to cultural values.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). A decisive part of what made denial of access to integrated schools so harmful in *Brown* was the intangible but culturally very real message of racial inferiority. *Id.* at 494–95.

harms are deeply gendered. The risks of unwanted pregnancy, disease, sexual exploitation, and rape do fall disproportionately on women. The instinct to warn young women against male predation does not strike all parents as necessarily wrong. It has been powerfully argued, most notably by Catherine MacKinnon, that sex and sexuality are central to the politics of women's subordination.<sup>53</sup> Experience and theory thus have taught us that sex equality law must be responsive to the needs of women faced with many forms of current, real, gendered harms that are relevant to sex education curricula.

Even as it accounts for real sex characteristics and sexual harms, however, the law of sex equality is also aspirational, seeking to promote equality in part by treating us as the equals that we are.<sup>54</sup> Those dual responsive and aspirational aspects of equal protection are especially highlighted by the sex education example. Because young people are involved, our desire to equip them to fend off real harms in a gender-scarred world is intensified, even while we pin ambitious hopes on them to exemplify egalitarian ideals. Properly understood, equal protection is indeed idealistic, but it need not be blindly so.

Egalitarian sex education should recognize the realities of sex-based subordination and harm even while it strongly counters sex-based stereotypes and double standards. It should acknowledge and oppose male-on-female aggression and the larger system of gender hierarchy that such aggression exemplifies and sustains. It should also, however, recognize that boys and men, too, are frequently harmed by sexual aggression, and that girls and women can be the moving force behind irresponsible or otherwise harmful sex.<sup>55</sup> And it should always—especially as applied to young people—express hope that old patterns will change.

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<sup>53</sup> See, e.g., MACKINNON, *supra* note 9; CATHERINE A. MACKINNON, *SEX EQUALITY* (2001).

<sup>54</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148–49 (1994) (O'Connor, J., concurring) (noting that “[w]e know that like race, gender matters” and that “one need not be a sexist to share the intuition that in certain cases a [juror’s] gender and resulting life experience will be relevant to his or her view of the case,” but nonetheless insisting that equal protection forbids sex-based generalizations in juror selection as “a statement about what this Nation stands for, rather than a statement of fact”); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (acknowledging that “it would ignore reality to suggest that racial and ethnic prejudices do not exist” and that “[t]here is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin,” but nonetheless concluding that “the reality of private biases and the possible injury they might inflict” are not “permissible considerations” for custody placement).

<sup>55</sup> Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 44 (2004) (noting that “queer theorists [cannot] seriously deny the existence and pervasiveness of sexual violation: of women by men, men by men, women by women, and sometimes, by women of men”); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998) (recognizing that Title VII’s sex discrimination prohibition covers male-on-male sexual harassment); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 488 n.1 (1981) (Brennan, J.,

Teaching sex stereotypes may actually leave students more vulnerable. Reflexive, blanket assumptions about where we will find sexual aggression or vulnerability may obscure where real dangers lie. Painting all males with the brush of sexual brutishness both naturalizes the wrong done by the rapist and obscures the good of the non-aggressor. Sex-based double standards also encourage female sexual passivity, lack of agency, and a culture of sexual objectification of women that neither protects women from unwanted sex nor advances their ability to find fulfillment in wanted sex.<sup>56</sup> The teaching of female passivity encourages women not only to deny their own desires, but also to deny their lack of desire. Consensual but unwanted sex is not rape, but can be harmful to those who submit to it.<sup>57</sup> The current and future well-being of our children is better served by factually informative, counter-stereotyping sex education, which emphasizes equal concern for the emotional and physical vulnerability of males and females, equal valuation of each person's pleasure and fulfillment, and an ethic of equal responsibility on the part of both sexes for self and others.

Sex education must contend with a legacy of official rationalizations for inequality in terms of "natural" sex differences. The vast web of sex-based hierarchy has been spun off of a kernel of anatomical sex difference. We once accepted educational exclusions premised on fears that women's reproductive organs would be harmed by academic exertion,<sup>58</sup> employment exclusions claimed necessary to protect women's chastity,<sup>59</sup> and exclusions from political life defended in terms of fears that women mixing in public meetings with men would lead to illegitimate offspring or other grim effects.<sup>60</sup> Against that

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dissenting) (critiquing California statute's failure to cover mature woman's seduction of "young and naïve" boys); Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 786–87 (2005) (acknowledging the reality, however rare, of female-on-male sexual abuse).

<sup>56</sup> See Fine, *supra* note 24, at 42 (advocating that public education include a discourse of female sexual desire and noting that, currently, "[p]ublic education's concern for the female victim is revealed as deceptively thin when real victims are discredited, and when nonvictimizing pleasures are silenced").

<sup>57</sup> See Robin West, *The Harms of Consensual Sex*, in *THE PHILOSOPHY OF SEX* 263–68 (Alan Soble ed., 3d ed. 1997).

<sup>58</sup> *United States v. Virginia*, 518 U.S. 515, 536 & n.9 (1996); *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975); EDWARD CLARKE, *SEX AND EDUCATION: OR A FAIR CHANCE FOR GIRLS* (1873) (offering dire predictions of results of educating girls and asserting that women developed problems with their "female organs" as a result of their failures to accept their limitations).

<sup>59</sup> E.g., *Goesart v. Cleary*, 335 U.S. 464, 466 (1948).

<sup>60</sup> *Virginia*, 518 U.S. at 531 n.5 (noting concern about "depravation of morals and ambiguity of issue," articulated as justification to keep women out of public meetings) (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5 1816), in 10 WRITINGS OF THOMAS JEFFERSON 45, 46, n.1 (Paul L. Ford ed., 1899)).

decidedly nonneutral historical backdrop, government's obligation to maintain neutrality with respect to gender roles might include an affirmative obligation on the part of public school curricula and teachers not only to refrain from propagating, but also to contradict, persistent sex-role stereotypes and double standards.

Sex education can be egalitarian without ignoring the realities of sex inequality. Teaching about sex-based discrimination, identifying historical patterns, and observing general trends is not the same thing as endorsing them. For equal protection purposes, as under the religion clauses, the constitutional line should be drawn between descriptive teaching, and prescriptive or normative advocacy of sexual double standards.<sup>61</sup> The line between description and advocacy may not always be easy to draw in practice because a teacher's discussion of the *status quo* can readily be taken as an affirmation of it. Mere descriptions of "the way most women (or men) are" may be statistically correct and descriptively accurate, but they are also at the heart of sex discrimination. The surest way to safeguard against the elision of descriptive and normative views of sex difference is to point it out.

To teach about sex, gender, and sexuality in a way that counters rather than reinforces stereotypes, egalitarian sex education curricula should explain what is wrong with sex-based generalizations when so much of what we see and know seems to confirm them. Antistereotyping doctrine acknowledges that there are many observable, statistically "real" differences between women and men—differences on points like aggressiveness, confidence, sensitivity, or cooperativeness. It also acknowledges the reality that males and females may face significantly different social consequences from the same behaviors, like chastity or promiscuity. Antistereotyping law nonetheless resists sex-based generalizations for good reasons, which teachers can convey.<sup>62</sup>

Egalitarian sex education should communicate relevant ethics and concerns to both sexes. It should affirm the value of sexual pleasure for females as well

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<sup>61</sup> See generally *Edwards v. Aguillard*, 482 U.S. 578, 607 (1987) (striking down state law requiring teaching of creationism, but acknowledging that "[c]ourses in comparative religion of course are customary and constitutionally appropriate" and that "a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down law authorizing moment of silence for prayer in school); *Tilton v. Richardson*, 403 U.S. 672, 686–87 (1971) (permitting public aid to colleges that "covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion," which "made no attempt to indoctrinate students or to proselytize").

<sup>62</sup> See *supra* text accompanying notes 13–15.

as males, and the vulnerability of males as well as females to emotional and physical harm. It should alert girls as well as boys that the power of sexual desire can test our rationality and emphasize that we are all nonetheless obligated—and are expected to learn—to exercise self-control. Egalitarian sex education should teach students of both sexes that parenthood imposes enormous responsibilities, which should be shared by both women and men. Evenhanded teaching about abstinence and contraception would stress that those behaviors are the responsibility of both sexes. Those messages can be taught consistently with a focus in sex education on preventing harm to youth by, for example, discouraging teens of both sexes from having sex; any abstinence message must, however, eschew sex-based double standards.<sup>63</sup>

In sum, retrogressive gender ideology, prescribing chastity and maternity for women while assuming lustfulness and autonomy for men, is at the heart of today's abstinence-only education movement. In that regard, the abstinence-only approach conflicts with the substantive norms of both equal protection and reproductive justice. Egalitarian sex education, in contrast, uses the teachings of constitutional antistereotyping doctrine to promote gender equality in a context in which it has important ramifications for avoiding unwanted pregnancies, promoting procreative responsibility, and enhancing the sexual agency and sex equality that reproductive rights are about. Boys will be less likely to engage in unwelcome and irresponsible sex or to spawn unwanted offspring if they are affirmatively taught to respect girls as equals, discouraged from linking their masculinity and power to sexual conquest, and taught to be caregivers responsible for and not threatened by intimate connection with children. Girls will be less likely to be victimized by unwanted sex or to face unintended pregnancy if their desire or its lack is deemed to be as important as men's, they feel empowered to act as sexual agents, and they have opportunities beyond motherhood to which they realistically can aspire. Counter-stereotyping sex education thus advances the interconnected goals of reproductive freedom and sex equality.

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<sup>63</sup> I do not here take a position on the abstinence message itself, beyond arguing that it must not be embedded with sexual stereotypes or discriminatorily applied to women and not men. Inequality, not sex, is the harm I am addressing. Just as some believe that abstinence is best, other families or communities condone responsible sexual activity among older teens. It thus seems plausible that some schools or school boards might elect not particularly to promote abstinence, but to emphasize sexual safety and responsibility instead. Ruth Colker argues, for example, that it is not teen sex or even teenage parenthood as such that is individually and socially harmful, but that teenage pregnancy “becomes problematic because of the inadequate social resources devoted to facilitating the pregnancy” and the ensuing family's well-being. Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 329–30; see also *infra* Part III.



## II. CONTRACEPTIVE EQUITY: THE EQUALITY RIGHT TO AVOID OR POSTPONE MOTHERHOOD

Sex equality law also has a vital role to play in assuring that women and men have access to reliable and affordable birth control. For both supporters and opponents of abortion rights, avoidance of unwanted pregnancy is preferable to termination of pregnancy through abortion. Compared to abortion, contraception is generally safer, easier on women's bodies, more private,<sup>64</sup> less expensive, and draws fewer religious or moral objections. The antiabortion movement decries abortion as if it were a mere "convenience" for people too irresponsible to plan ahead, and it finds licentiousness in the notion of "abortion on demand."<sup>65</sup> Abortion should not be used as just another form of contraception, they argue. The implication is that people unwilling to parent a child or offer it for adoption should use birth control.<sup>66</sup>

Despite widespread support for contraceptive use, our public policy and law regarding contraceptive equity contributes to the failures of millions of sexually active people to use contraception when they do not want children.<sup>67</sup>

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<sup>64</sup> Abortion is protected by what is often characterized as a privacy right, but as a practical matter, the need to involve medical personnel and often one's parents in an abortion, and to have the procedure done in a clinic or hospital, make it a much less private procedure than a woman's use in her own home of birth control drugs or devices, like pills or a diaphragm.

<sup>65</sup> See, e.g., Robert H. Bork, *Inconvenient Lives*, 68 FIRST THINGS 9, 11–13 (1996).

<sup>66</sup> Some opponents of abortion believe that nonprocreative sex (and thus contraception) is acceptable only within marriage. Others believe that intercourse should be reserved for reproduction alone, and oppose contraception even within marriage on grounds that interference with a fertilized egg, as by the IUD or the birth control pill, ends a human life. See, e.g., Pope Paul VI, *Humanae Vitae: Encyclical of Pope Paul VI on the Regulation of Birth* (July 25, 1968), in 13 THE POPE SPEAKS 329–46 (1969). Nonetheless, far fewer people object to contraception than oppose abortion; I do not here engage the views of contraception opponents, but take as a starting point that the right to use contraception is constitutionally protected, whether the person seeking to use it is married or single, mature or young. See generally *Carey v. Population Serv. Int'l*, 431 U.S. 678, 693, 697–99 (1977) (contraceptive rights of persons under age 16); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (contraceptive rights of unmarrieds); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (articulating contraceptive rights of married persons). In recognizing the due process right to gay sex in *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003), the Supreme Court also reaffirmed the value of and constitutional right to nonprocreative sex more generally. As noted above, it may be appropriate for public school teachers in sex education courses to encourage youth to abstain from sex. Government cannot constitutionally require or assume, however, that adults will abstain from sex, including intercourse, with other consenting adults, nor can it penalize those who fail to abstain.

<sup>67</sup> "More than 40 years after the contraceptive revolution began with the approval of the contraceptive pill, the United States lags far behind its social and economic counterparts when it comes to effectively reducing the burdens of unintended pregnancy and of sexually transmitted infections (STIs) and related fertility problems." ALAN GUTTMACHER INST., *THE UNFINISHED REVOLUTION IN CONTRACEPTION: CONVENIENCE, CONSUMER ACCESS, AND CHOICE* 3 (2003), <http://www.guttmacher.org/pubs/2004/09/20/>

Contraceptive shortfalls, in turn, arise in part from reference to male health needs as the baseline for health care and insurance coverage, including coverage of contraception.<sup>68</sup> Equally meeting women's health needs, whether they are the same as men's or distinctive as they often are in the area of reproductive health, is a critical aspect of treating women as equal human beings. Proponents and opponents of abortion rights alike, if they are committed to sex equality, should join forces in supporting full and equal access to contraception for women and men.

The lack of a national requirement that insurance plans cover women's contraceptives is emblematic of a much broader failure to make contraceptive access a priority to reduce the extremely high numbers of unintended pregnancies in the United States. The contraceptive equity issue as it relates to health insurance plans is just one facet of a larger set of sex inequalities in the area of reproductive health. It presents an opportunity to uncover a partly submerged and critically important theoretical rift in our understandings of reproductive health and sex equality more generally, and helps point the way to more sound approaches to both.

On one side of the rift is the Court's approach to constitutional equality law that refuses to treat discrimination based on pregnancy as sex-based discrimination. That theory calls for equality of the sexes only insofar as women are nonreproducing persons. According to that theory, insofar as women and men are not similarly situated with respect to pregnancy, they need not be treated equally.

This theory has its most prominent legal statement in *Geduldig v. Aiello*,<sup>69</sup> which held that denial of disability benefits for pregnancy-related disabilities while providing coverage for other, similarly disabling conditions did not violate the Equal Protection Clause.<sup>70</sup> *Geduldig* reasoned that the challenged disability policy discriminated, not between women and men, but between pregnant and nonpregnant persons (the latter group including both females and males).<sup>71</sup> The Court thus eschewed the heightened scrutiny required of sex-based distinctions in favor of rational-basis review and upheld the exclusion based on the state's interest in fiscal integrity. In *General Electric Co. v.*

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UnfinRevInContra.pdf. Opposition by social conservatives has decreased funding for contraceptive health and, consequently, women's access to contraceptives. *Id.* at 9.

<sup>68</sup> See Colker, *supra* note 63, at 344–46 (noting that the baseline also is implicitly white and wealthy).

<sup>69</sup> 417 U.S. 484 (1974).

<sup>70</sup> *Id.* at 494–95.

<sup>71</sup> *Id.* at 496 n.20.

*Gilbert*,<sup>72</sup> the Court promptly extended that constitutional theory of equality to its interpretation of Title VII.<sup>73</sup>

A second theory, reflected in federal statutory equality mandates, views sex equality as also applicable to reproducing persons. It understands discrimination based on pregnancy or other aspects of women's reproductive capacity as discrimination based on sex, requiring that women's pregnancy or contraceptive needs be treated as favorably as other, analogous conditions that also affect men. This view of sex equality understands that pregnancy and related conditions are often used as proxies for femaleness and excuses for sex discrimination. It thus carefully scrutinizes distinctions based on reproductive capacity or role as likely sites of unequal treatment.

This second theory is exemplified by the Pregnancy Discrimination Act (PDA), a 1978 amendment to Title VII that overruled *Gilbert* to define discrimination "on the basis of pregnancy, childbirth, or related medical conditions"—such as the ability to become pregnant—as prohibited sex discrimination.<sup>74</sup> As a practical matter, the Pregnancy Discrimination Act rendered *Geduldig*'s reasoning all but a dead letter (at least in the employment context) for thirty years.<sup>75</sup> A law that targets women's distinctive reproductive capacity or conduct is, under Title VII, a law aimed at women because of their sex. It is therefore unlawful to provide unequal employment opportunities or fringe benefits to women and men, even when the difference is based on demonstrated sex distinctions like pregnancy or the capacity to become pregnant. For example, the Supreme Court has held that the difference in women's reproductive anatomy does not justify exclusion of fertile women from jobs involving lead exposure with potential harmful consequences to fertility or fetal development.<sup>76</sup>

The second theory has found straightforward application in the context of contraceptive access. Health insurance plans that deny contraceptive coverage usually cover all other drugs or devices, even those not required for an illness

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<sup>72</sup> 429 U.S. 125 (1976).

<sup>73</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000).

<sup>74</sup> § 2000e(k) (2000).

<sup>75</sup> *Geduldig* has not been wholly devoid of doctrinal force. For example, the Court in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271–73 (1993), invoked *Geduldig* in refusing to apply to abortion clinic blockades a federal law prohibiting conspiracies motivated by "class animus" (e.g., race, sex). See 42 U.S.C. § 1985(3). The blockades were not targeted at women based on sex, the Court reasoned, because women were not only among those seeking abortions, but also among those objecting. *Bray*, 506 U.S. at 270.

<sup>76</sup> *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991).

or abnormal condition. They provide coverage for purely preventative care (e.g., vaccinations, medications to maintain healthy blood pressure or cholesterol level), for drugs and devices needed due to voluntary “lifestyle choices” (e.g., weight-loss drugs and drugs and devices relating to alcohol abuse or smoking cessation), and even drugs, like Viagra, that facilitate intercourse for men. Under these plans, anyone who needs Anabuse to help with a drinking problem, or Lipitor to reduce cholesterol levels, or Viagra to enhance sexual performance, is entitled to see a doctor and have medication prescribed. However, a woman who wants contraception so that she can enjoy sex and prevent pregnancy must pay for a doctor visit to obtain a prescription, and then she must pay for the contraception itself.<sup>77</sup>

Such policies’ contraceptive exclusion does not directly affect covered men because condoms require no prescription or doctor’s fitting. Subscribers pay out of pocket for condoms just as members of both sexes pay for any other over-the-counter drug or device. Condoms are inexpensive and widely available nationwide, around the clock, in urban and rural areas alike. They can be picked up at convenience stores, drugstores, grocers, vending machines in men’s restrooms, and even from bowls at clinics, parties, and clubs. Contraceptives used by women—including birth control pills, intrauterine devices, diaphragms, Implanon (subcutaneous implants), and emergency contraceptive pills for young women—require a doctor’s prescription, yet are carved out for explicit exclusion from some otherwise comprehensive prescription benefit plans.<sup>78</sup>

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<sup>77</sup> A recent study reports that 46% of women pay \$15 for each month’s supply of oral contraceptives, and that out-of-pocket expenses and dispensing restrictions inhibit access to contraception. See ALAN GUTTMACHER INST., *supra* note 67, at 9. The average cost of a physician’s visit for contraceptive prescription is approximately \$85, and women taking the pill (the method used by over 30% of women using any method of birth control) typically visit their doctors once a year for prescription refills. Holly Mead, *Making Birth Control More Accessible to Women: A Cost-Benefit Analysis of Over-the-Counter Oral Contraceptives*, BRIEFING PAPER (Inst. for Women’s Policy Research, Wash., D.C.), Feb. 2001, at 3, <http://www.iwpr.org/pdf/otc0201.pdf>. 14.4% of women in the United States lack health insurance altogether (including Medicaid) and thus lack contraceptive as well as other routine health care coverage. HEALTH RES. & SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., WOMEN’S HEALTH USA 2005, at 64 (2005), [http://mchb.hrsa.gov/whusa\\_05/\\_pdf/whusa2005.pdf](http://mchb.hrsa.gov/whusa_05/_pdf/whusa2005.pdf). These women—disproportionately poor, young, minority and immigrant—must also pay the out-of-pocket charges for contraceptive health care or find a clinic that offers subsidized contraceptive health services. See generally ALAN GUTTMACHER INST., FULFILLING THE PROMISE: PUBLIC POLICY AND U.S. FAMILY PLANNING CLINICS 16 (2000), <http://www.guttmacher.org/pubs/fulfill.pdf>.

<sup>78</sup> After this Symposium was held in the spring of 2006, the FDA approved emergency contraception for over-the-counter sales to adults. Press Release, U.S. Food & Drug Admin., FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>. Approval of over-the-counter sales of

Failure of otherwise comprehensive insurance plans to cover prescription contraceptives is a significant form of sex discrimination. Such discrimination has become especially vivid in light of the development and widespread prescription of Viagra for men. Otherwise-comprehensive prescription benefit plans treat male enjoyment of sex with the aid of Viagra (without the condition that it be for procreation) as a shared concern warranting insurance coverage, while treating women's ability to enjoy sex without risk of unwanted pregnancy as a personal issue to be addressed out of the woman's own pocketbook. (Condom use, needless to say, does not adequately protect women as it is not wholly within their control). Those policies, like the abstinence-only curricula discussed in Part I, track some of the most ingrained sex stereotypes—defining men in terms of potency, sexuality and otherwise, and women in terms of motherhood, even when they would not choose it.<sup>79</sup>

In recognition of the inequity of contraceptive exclusions, more than twenty states have enacted contraceptive equity laws, reinforcing and expanding on the PDA's approach, specifically requiring health insurance plans regulated by state law to cover contraception.<sup>80</sup> Where state law does not require such coverage, sex discrimination lawsuits have established an entitlement to contraceptive equity under Title VII, as a handful of courts and the federal Equal Employment Opportunity Commission have held that

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emergency contraception was a positive development in terms of the equality and reproductive rights argument advanced here. Emergency contraception (nonprescription) is now more readily available to adult women than contraception used before and during intercourse, such as the pill, diaphragm, or IUD (which still require prescriptions).

<sup>79</sup> To the extent that exclusion of contraception from otherwise comprehensive health plans implies that contraception is something other than a health need, the implication is flatly counterfactual. Childbearing may be natural, healthy, and, ideally, joyful, but so, for example, are maturation and ageing, yet neither comes without health implications. There is no question that before the widespread availability of contraception, the bearing of large numbers of children was an enormous burden on women's health and was a leading cause of maternal death. *Achievements in Public Health, 1900–1999: Healthier Mothers and Babies*, 48 MORBIDITY & MORTALITY WKLY. REP. 849 (1999). Even now, when the average number of children per woman in the United States hovers around 2.1 births per woman, a woman who uses contraceptives is exposed to less health risk than a woman who undergoes childbirth. See, JANE LAWLER DYE, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: FERTILITY OF AMERICAN WOMEN: JUNE 2004, at 1 (2005), <http://www.census.gov/prod/2005pubs/p20-555.pdf>; CICELY MARSON & JOHN CLELAND, WORLD HEALTH ORG., THE EFFECTS OF CONTRACEPTION ON OBSTETRIC OUTCOMES 5 (2004), [http://www.who.int/reproductive-health/publications/2004/effects\\_contraception/text.pdf](http://www.who.int/reproductive-health/publications/2004/effects_contraception/text.pdf); Ushma D. Upadhyay & Bryant Robey, *Why Family Planning Matters*, POPULATION REP., July 1999, at 1, available at <http://www.infoforhealth.org/pr/j49/j49.pdf>.

<sup>80</sup> ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF JANUARY 1, 2006, [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (reporting that 26 states require that insurers covering prescriptions drugs in general also cover the full range of FDA-approved contraceptive drugs and devices); NAT'L WOMEN'S LAW CTR., CONTRACEPTIVE EQUITY LAWS IN YOUR STATE: KNOW YOUR RIGHTS – USE YOUR RIGHTS 1 (2003), <http://www.nwlc.org/pdf/concovstateguide2003.pdf>.

employers that offer otherwise comprehensive insurance coverage of drugs and devices must also cover birth control.<sup>81</sup> Just as women cannot be discharged or otherwise disadvantaged at work because they use (or do not use) contraceptives, they cannot be denied coverage of contraceptives under an employer-sponsored health plan that provides benefits for comparable drugs and devices.<sup>82</sup> The PDA, the EEOC's decision explained, was enacted to "ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to have children."<sup>83</sup> The PDA approach is thus the prevalent one, and most insured women in the United States do have contraceptive coverage.<sup>84</sup>

*Geduldig's* narrower understanding of sex discrimination is nonetheless a crack in the foundation of contemporary equality law. *Geduldig's* destructive potential is hinted at by a recent contraceptive equity case, *Cummins v. Illinois*.<sup>85</sup> The district court in *Cummins* broke from the trend in favor of contraceptive equity to sustain Illinois's exclusion of prescription contraception against a sex discrimination challenge.<sup>86</sup> Although Title VII would seem to forbid that result, the judge in *Cummins* relied on a version of *Geduldig's* reasoning: "non-surgical control of fertility is excluded equally to

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<sup>81</sup> See, e.g., *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) (holding that "as prescription contraceptives are only available to women, the exclusion is not gender neutral because it only burdens female employees"); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (requiring contraceptive coverage under Title VII, noting that "mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women"); U.S. Equal Employment Opportunity Comm'n, Decision on Coverage of Contraception (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> [hereinafter *EEOC Decision*] (opining that even though the plan at issue did not explicitly distinguish between men and women, prescription contraceptives are available only for women and the plan's exclusion of them was thus sex based). As this issue went to press, a divided Eighth Circuit panel in *In re Union Pac. R.R. Employment Practices Lit.*, 479 F.3d 936 (2007), sustained a health plan's exclusion of prescription contraception, reasoning that contraception is not "related to" pregnancy within the terms of the PDA, and that its exclusion is not sex discrimination under Title VII because the plan equally excludes women's and men's contraception. The decision seems quite clearly wrong, as its PDA analysis contravenes that statute's terms and purpose to cover pre-pregnancy reproductive health, see *Johnson Controls*, 449 U.S. at 200, and its Title VII analysis improperly failed to find sex inequality in plans not equally comprehensive as to women and men. The decision should add impetus to current efforts to enact federal contraceptive equity legislation.

<sup>82</sup> *EEOC Decision*, *supra* note 81, at 2.

<sup>83</sup> *Id.*

<sup>84</sup> ALAN GUTTMACHER INST., FACTS IN BRIEF: CONTRACEPTIVE USE 2 (2006) (reporting that "9 in 10 employer-based insurance plans cover a full range of contraceptives, which is 3 times the proportion just a decade ago").

<sup>85</sup> 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005), *appeal filed*, No. 05-3877 (7th Cir.).

<sup>86</sup> In 2003 (effective Jan. 1, 2004), Illinois amended its law prospectively to require that insurance plans include contraception in otherwise comprehensive plans, 215 ILL. COMP. STAT. ANN. 5/356z.4 (West 2006), but the *Cummins* class action remains pending on the plaintiffs' monetary claims for lost benefits.

both sexes,” apparently just as pregnancy disability coverage in *Geduldig* was denied equally to all “pregnant persons.”<sup>87</sup> It did not seem to matter to the court that only women suffered the prescription-contraception exclusion, just as it did not matter in *Geduldig* that pregnancy is a condition unique to women.<sup>88</sup>

As of this writing, *Cummins* is on appeal, and the decision may yet be reversed or the case may be settled out of court. The decision nonetheless highlights troubling and persistent instability in the law of sex equality. One aspect of that instability is the apparent gap between the two theories of sex discrimination identified above. If the Constitution demands equality only for nonreproducing men and women, can Congress constitutionally require more? In doctrinal terms, the instability can be reduced to whether Title VII, as amended by the PDA, is “appropriate legislation,” implementing constitutional equality as the Supreme Court understands it, and thus validly abrogating sovereign immunity.<sup>89</sup> The Supreme Court’s federalism cases require a theory

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<sup>87</sup> 2005 U.S. Dist. LEXIS 42634, at \*24.

<sup>88</sup> The *Cummins* court also reasoned, in a puzzling non sequitur, that because women and men both are involved in procreation, denial of birth control to women equally affects both sexes: While it is true that “[c]onception is by definition the fertilization of the ovum, which takes place inside a woman’s body,” the court wrote, it is not true that

[h]ealth plans that deny coverage for contraception, by definition, affect only the health of the women . . . . [T]he process clearly requires the participation of both males and females, and, critically, the process may therefore be prevented by either the male or the female, each of whom is consequently equally affected by the exclusion in this case.

*Id.* at \*\*24–25. Although his reasoning is not entirely clear, it seems that Judge Gilbert is suggesting that because contraception is a barrier between sperm and ovum, both sexes are equally affected by unavailability of female contraception as a method to be used when the couple has sex. To the extent that men prefer the pill over condoms, for example, the exclusion equally deprives the male sex partners of female employees of the pill as a contraceptive choice. That view overlooks, however, that it is women, not men, who become pregnant, that only female contraceptives can prevent pregnancy without regard to men’s willingness to cooperate, and that, presumably for those very reasons, female contraceptives are prescribed to women, not to men. If condoms required a prescription and the pill did not, and condoms were excluded from otherwise comprehensive health insurance, men might have valid sex discrimination claims just as I believe women do in cases like *Cummins*. They would have such claims even though, as Judge Gilbert’s reasoning suggests, women, too, have a very strong stake in condom use. Indeed, women’s stake in such claims would be considerably stronger than that of men in *Cummins* due to the ability of condoms to shield against sexually transmitted diseases, including HIV/AIDS, to which women are disproportionately vulnerable. The other sex’s stake, however, does not remove the inequality of noncoverage of one sex’s contraception.

<sup>89</sup> It is the Supreme Court’s federalism revolution that threatens to revive *Geduldig* as an obstacle to women’s equality. One of the major lines of Rehnquist Court’s federalism cases held that plaintiffs cannot obtain damages against nonconsenting states under a federal statute (e.g., Title VII) unless they can demonstrate that the statute is a valid congressional implementation of constitutional guarantees. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59–60 (1996); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). The animating idea is that, under our federalist system, states retain sovereign immunity against damage claims

of how the PDA implements the judicial understanding of the Equal Protection Clause, notwithstanding *Geduldig*.

That theory is suggested by the Court's 2003 decision in *Nevada Department of Human Resources v. Hibbs*, which sustained a damage claim against the state under the Family and Medical Leave Act.<sup>90</sup> The Court in *Hibbs* specifically noted in dicta that Congress validly abrogated sovereign immunity in enacting Title VII, of which the PDA is a part.<sup>91</sup> The disparate-treatment aspects of Title VII are indisputably appropriate legislative enforcement of judicially defined equal protection rights, as the substantive requirement of Title VII simply tracks the strong constitutional presumption against distinctions motivated by or expressly based on sex.<sup>92</sup> A classic example of unconstitutional sex discrimination that is also pregnancy discrimination under the PDA is the failure to hire or promote a woman based on the assumption that, because of her sex, she is more likely than an otherwise comparable male to leave work once she has children.<sup>93</sup> That kind of sex stereotyping is at the core of what equal protection forbids.

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except where Congress has outlawed the state conduct as a "congruent and proportional" way to protect constitutional rights. Thus, mere commercial legislation pursuant to Congress's broad Commerce Clause power cannot overcome state sovereign immunity. *Seminole Tribe*, 517 U.S. at 52–54. Because the post-Civil War Reconstruction Amendments were enacted to provide constitutional protection against state discrimination, however, and Section 5 of the Fourteenth Amendment expressly confers enforcement power on Congress, legislation that effectuates equal protection rights may trump state sovereign immunity. The sovereign immunity defense was not properly raised in *Cummins*. See Brief for the Nat'l Women's Law Ctr. et al. as Amici Curiae in Support of Appellant Tana Cummins at 21 n.5, *Cummins v. Illinois*, No. 05-3877 (7th Cir. Apr. 3, 2006). But whether there or in other similar cases the issue will be whether Title VII as amended by the PDA is valid as an implementation of the equal protection guarantee against sex discrimination, even though the Court in *Geduldig* held that denial of benefits to "pregnant persons" is not sex discrimination. See *id.* at 27; Brief for Appellant at 36–40, *Cummins*, No. 05-3877. There is room under Section 5 for Congress to legislate more broadly than a court would rule under *Geduldig*. The Court has repeatedly insisted that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Boerne*, 521 U.S. at 518; see also *Tennessee v. Lane*, 541 U.S. 509, 518 (2004); *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966). Nonetheless, several important antidiscrimination measures have fallen under the Supreme Court's Section 5 sword, including provisions of the Violence Against Women Act (see *United States v. Morrison*, 529 U.S. 598, 599 (2000)); the Age Discrimination in Employment Act (see *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63 (2000)); and the Americans with Disabilities Act (see *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 358 (2001)).

<sup>90</sup> 538 U.S. 721 (2003).

<sup>91</sup> *Id.* at 727 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), as having so held).

<sup>92</sup> See *United States v. Georgia*, 126 S. Ct. 877, 878 (2006) (concluding that "no one doubts that § 5 grants Congress the power to . . . creat[e] private remedies against the States for actual violations of [constitutional] provisions").

<sup>93</sup> *Hibbs*, 538 U.S. at 730–32.



To the extent that Title VII exceeds the judicially enforced equal protection norm by forbidding policies with only pregnancy-related disparate impact,<sup>94</sup> Title VII seems also to fall within the Fourteenth Amendment's Section 5 power as an appropriate legislative way to prevent and remedy unconstitutional discrimination.<sup>95</sup> Examples of disparate-impact sex discrimination relating to pregnancy would be policies depriving employees of seniority on return from pregnancy disability leave<sup>96</sup> or providing no leave to employees of either sex for conditions like maternity disability or similarly temporary disabling conditions.<sup>97</sup> Statutory disparate-impact standards can be justified under Section 5 even though the Court has declined to recognize disparate-impact claims directly under Section 1 of the Equal Protection Clause.<sup>98</sup>

Authorization of disparate-impact claims specifically relating to "pregnancy, childbirth or related medical conditions" should be easier to justify as "appropriate" Fourteenth Amendment legislation than Title VII's authorization of disparate-impact sex discrimination claims more generally.<sup>99</sup> Discrimination relating to women's reproductive role is at the heart of sex inequality. Much of that discrimination—such as employers' bias against women based on assumptions that women will become pregnant and that those who do will be less able or reliable workers—is unconstitutional even under *Geduldig*.<sup>100</sup>

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<sup>94</sup> *Personal Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (sex-based disparate impact alone does not violate Section 1 of the Equal Protection Clause).

<sup>95</sup> Disparate impact claims were well established at the time of *Fitzpatrick*, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971), and *Fitzpatrick* does not suggest that it is limited to disparate-treatment claims. *Fitzpatrick*, 427 U.S. at 455. *Hibbs* rejected the suggestion that a ban on discriminatory leave policies alone would suffice to prevent unconstitutional sex discrimination, explaining that doing so would allow no-leave policies, which would have the effect of excluding more women than men from the workplace. *Hibbs* thus affirmed the FMLA as a remedy for such *de facto* discrimination, or disparate impact. *Hibbs*, 538 U.S. at 737–38. Lower courts have sustained Title VII's disparate-impact prong against Section 5 challenges. See, e.g., *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 626–27 (8th Cir. 2001); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1316–24 (11th Cir. 1999).

<sup>96</sup> *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139–40 (1977).

<sup>97</sup> *Hibbs*, 538 U.S. at 737–38.

<sup>98</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 652–53 (1966).

<sup>99</sup> It remains somewhat unclear the extent to which the constitutionality of a federal law under Section 5 is subject to piecemeal analysis. See *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (sustaining Title II of Americans with Disabilities Act as applied to claims involving fundamental right of access to courts); *id.* at 551 (Rehnquist, J., dissenting) (expressing "grave doubts" about use of as-applied analysis in Section 5 context); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1356–59 (2000) (finding ambiguity in *Florida Prepaid Postsecondary Education Expense Board v. College Saving Bank*, 527 U.S. 627 (1999), as to whether Section 5 challenges are necessarily facial or may be as applied).

<sup>100</sup> *Hibbs*, 538 U.S. at 730–32.

Given the apparent validity under Section 5 of the legislative response to *Geduldig*, the continuing coexistence of the two theories of sex discrimination may have little immediate practical consequence. Strategically, perhaps the best approach is simply to continue to minimize the significance of *Geduldig* and the desiccated theory of sex discrimination it stands for, and advocate, on a piecemeal basis, for additional measures to break down reproduction-related sex hierarchies. The Supreme Court in *Hibbs* has already expressly cabined *Geduldig*, making clear that “where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.”<sup>101</sup> If state and federal legislators have enacted and will continue to expand protections against reproductive sex discrimination—like the PDA, the FMLA, paid leave, and childcare support—there is less practical need to push to overrule *Geduldig*. There is also the unlikely but very costly risk that the Supreme Court, if given the chance, would reaffirm rather than limit or overrule *Geduldig*. Perhaps we should reconcile ourselves to living in *Geduldig*’s shadow.

Doing so is not, however, without costs. It seems clear that *Geduldig* is wrong.<sup>102</sup> Failure to overturn it helps to foster a broader ambivalence about

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<sup>101</sup> Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1873 (2006). Siegel explains that *Geduldig* itself was an expressly narrow opinion in a way that *Hibbs* has since made clear:

*Geduldig* holds that “not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*.” It leaves open the possibility that *some* legislative classifications concerning pregnancy *are* sex-based classifications like those considered in *Reed* and *Frontiero*. And *Hibbs* provides examples of legislative classifications concerning pregnancy (e.g., statutes that grant “maternity” leave and “pregnancy disability” leave) that the Court holds are “gender-discriminatory” and rest on “the pervasive sex-role stereotype that caring for family members is women’s work.”

*Id.* at 1891–92 (citing *Hibbs*, 538 U.S. at 731).

<sup>102</sup> The scholarly consensus is strongly critical of *Geduldig*; indeed, it is difficult to find scholars supporting the decision. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 758–59 (2006) (stating that “it is hard to imagine a clearer sex-based distinction” than the one at issue in *Geduldig*); Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569, 608 (1992) (noting that *Geduldig* has “been subjected to harsh criticism and even ridicule for [its] assertion that a distinction directly targeting a biological characteristic that only women possess and thus disadvantaging only women does not constitute a sex based distinction”); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268 (1992) (observing that “[t]he Court’s equal protection analysis in *Geduldig* is by now infamous”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (reporting that criticism of *Geduldig* became “a cottage industry,” and that even the leading defense of the decision acknowledges that the Court’s failure to treat the state policy as sex based was in error). On the merits, the critics have the better arguments. See, e.g., Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography,*

the meaning and scope of sex equality on core issues relating to the sexes' reproductive distinctiveness. Women's reproductive capacity stands at the heart of the construction of women's unequal social, political, and economic roles, so we cannot hope to achieve sex equality without a theory of equality that accounts for pregnancy, childbearing, or related conditions. Even assuming the continued vitality of the PDA, *Geduldig*'s coexistence with the PDA is a reminder that protection against discrimination based on reproductive distinctiveness remains an optional matter of legislative policy that Congress could repeal tomorrow, not a bedrock, constitutional protection that all official action must respect.

The contraceptive equity cases also point to a second instability in the law of sex equality. Whether we assume that the bar against discrimination based on reproductive distinctiveness remains only a statutory guarantee, or that *Geduldig* is narrowed or reversed so that the bar is recognized to have constitutional force, there remains some ambiguity about the nature of the protection that bar affords. This second instability is less about which kinds of adverse conduct should be viewed as *based on sex* than about the meaning of sex *discrimination* in the context of reproductive capacity. Specifically, is it enough to treat men and women the same, without regard to whether the particular symmetrical treatment offered fails to permit both sexes to participate in society as equals? Or does women's equal liberty depend on whether equal treatment assures their ability to control their fertility (through benefits like health insurance coverage of contraception)?

One way of getting at that question is to examine the sex-based harm of insurance policies that exclude contraception. Is the discriminatory harm the meeting of all male health needs while meeting female needs, minus one? That is plainly a large part of it. The courts that have found discrimination in

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*Abortion, and Surrogacy*), 92 COLUM. L. REV. 1, 32 (1992) (arguing that "[a] statute that is explicitly addressed to women is of course a form of sex discrimination" and that "[a] statute that involves a defining characteristic or a biological correlate of being female should be treated the same way"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1580, 1584 (2d ed. 1988) (noting that "[t]he proper comparison in *Geduldig* . . . was not between pregnant women and all other nonpregnant workers, but between female employees who had engaged in reproductive behavior and male workers who had done likewise"); Siegel, *supra*, at 269–70 (criticizing *Geduldig* for "ignor[ing] the fact that the capacity to gestate distinguishes the sexes physically . . . and socially: Judgments about women's capacity to bear children play a key role in social definitions of gender roles and thus in the social logic of 'discrimination based on gender as such'"); see also Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 UNIV. OF CHI. LEGAL F. 21, 88 n.339 (contending that the exclusion authorized by *Geduldig* unrealistically "assumes that the worker with a pregnancy related disability has some other means of support," when in fact she typically "needs money for her own survival and the survival of the new citizen dependent on her").

contraceptive equity cases point to the disjuncture between comprehensive coverage of drugs and devices needed by men, and incomplete coverage of drugs and devices needed only (and pervasively) by women.<sup>103</sup> The exclusion of “contraception” from a list of covered drugs and devices, when that term refers to something exclusively needed by women, equates the exclusion to one which expressly says “female contraception is excluded.” The latter is plainly sex based, and the former (really identical) exclusion is, too. To deny it would be akin to saying that heightened equal protection scrutiny is inapplicable to a government job announcement saying “candidates with breasts need not apply”; the excluded category equates to the category of women, while barely avoiding saying so. That is clearly a form of sex discrimination, and the contraceptive equity decisions correctly recognized it as such.

But that does not fully capture the sex discrimination at issue here. Imagine that men’s contraception also required a doctor’s prescription and that it was equally expensive and inconvenient for men to see their doctors and get and fill those prescriptions. If under those circumstances men and women’s contraception were equally excluded from health insurance coverage, would exclusion no longer be a form of sex discrimination? Under the reasoning just identified, perhaps it would not be. There may be more, however, to the contraceptive equity theory.

Part of the inequity in the cases also relates to the fact that it is contraception, and not some other sex-specific benefit—Viagra, breast implants, or even treatment for premenstrual syndrome—that is excluded from the insurance plans. It is not just the denial of coverage for a sex-specific drug or device that is problematic. The policies are particularly inequitable because they refuse to cover medical care that empowers women to control their reproductive capacity. The point of the PDA, according to the EEOC, was not just to mandate formal equality in the employment and benefits offered to

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<sup>103</sup> See, e.g., *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (“Potential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant.”); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (“The special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs”); *EEOC Decision*, *supra* note 81 (Exclusion of contraceptive coverage is sex based because “prescription contraceptives are available *only* for women . . . . As a result, Respondents’ explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. Because 100 percent of the people affected by Respondents’ policy are members of the same protected group—here, women—Respondent’s policy need not specifically refer to that group in order to be facially discriminatory.”).

women and men, but also to “ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to have children.”<sup>104</sup> That theory of equality is more robust than the bare, formal equality discussed above.

That fuller theory of sex equality is not limited to the concern that the insurance plans cover Viagra and not the pill, or that they deny something for which only women need a prescription while granting everything for which men do. That theory also recognizes as a precondition of equality women’s need to control their fertility—a need that is not met by equally denying contraceptive access to both sexes. For women especially, contraception is much more than a health need. The economic and emotional burdens of unintended pregnancy and the ensuing abortion or childbirth, fall heavily and disproportionately on women. Without access to the means to control and limit reproduction, the average woman would bear twelve to fifteen children in her lifetime.<sup>105</sup>

A society in which women lack control to plan when they have children is one in which women must remain second-class citizens. We already know, and the Court recognized in *Hibbs*, that many employers assume that to be a mother is to be a primary caregiver with correspondingly less job commitment than a man, who is presumed to be an unencumbered “ideal worker.”<sup>106</sup> If impaired access to contraceptives hinders women’s ability to exercise choice about when and whether to have children, it also reinforces broader patterns of discrimination against women as a class of presumptive breeders rather than reliable breadwinners and citizens.

Women and men have an equal moral claim (and constitutional right) to sexual intimacy, yet contraceptive exclusions suggest that women must pay for that right in ways that men need not. The right to engage in nonprocreative sex, which the Supreme Court has protected from *Griswold v. Connecticut*<sup>107</sup> through *Lawrence v. Texas*,<sup>108</sup> can only be equally assured to women when

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<sup>104</sup> EEOC Decision, *supra* note 81.

<sup>105</sup> *Improving Women’s Health: Why Contraceptive Insurance Coverage Matters: Hearings on S. 104 Before the S. Comm. on Health, Education, Labor and Pensions*, 107th Cong. 38 (2001) (statement of Jennifer Erickson, pharmacist). The availability of the birth control pill alone accounts for much of the leap in the proportion of high-powered professional jobs held by women in the United States (from 5% in 1960 to 25% in 1998). LUKER, *supra* note 8, at 75.

<sup>106</sup> *Hibbs*, 538 U.S. at 736–37; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 71–72 (2000).

<sup>107</sup> 381 U.S. 479, 485–86 (1965).

<sup>108</sup> 539 U.S. 558, 578–79 (2003).

they have ready access to safe and effective birth control. Plans that fail to provide access to contraception on the same terms as other drugs and devices are inconsistent with women's equal liberty.

In light of maternity's burdens on women, it is inconsistent with sex equality for women to be left vulnerable to impregnation against their will, even as a result of otherwise consensual intercourse. Medical technology today makes a range of woman-controlled contraceptives feasible and relatively inexpensive, and women have come to assume that family planning is part of a healthy and responsible life. Under these circumstances, even formally equal *denial* of contraceptive access should be understood as sex discrimination. In theoretical terms, the formal-equality approach to contraceptive access is incomplete without a cultural feminist skepticism of any implicitly male baseline of contraceptive coverage. A fuller understanding of equality would require that access *extend* equally to both sexes.<sup>109</sup>

Women's equal freedom of intimate association and liberty to invest in life plans on equal terms with men—plans for education, employment, or family that can span years—require that contraception be treated as a routine health benefit and not excluded from public or private health insurance coverage. Women cannot participate in society, learn, earn, govern, and thrive equally without the ability to determine whether and when to become mothers. The Court's observation in the lead opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, is relevant here, too: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>110</sup> Women's ability to prevent unintended pregnancy depends on having access to contraception that they can control.

In sum, although women are, in the narrow sense of *Geduldig*, differently situated from men due to the distinct reproductive capacities of each sex, the law of sex equality—constitutional as well as statutory—should prohibit discrimination based on pregnancy, childbirth, and related conditions. Those aspects of women's reproductive distinctiveness have historically been a touchstone of the sex-based division of labor that so much of our equal

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<sup>109</sup> This is the approach to sex equality accomplished by the reconciliation of the California pregnancy disability leave provision and Title VII in *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 289–91 (1987).

<sup>110</sup> 505 U.S. 833, 835 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter joined in relevant part by Justices Blackmun and Stevens).

protection law aims to uproot. Discrimination against women as mothers or potential mothers remains a widespread equal protection and reproductive freedom problem today, and recognizing equality claims in the reproductive health area is one step toward addressing that problem.

Put differently, equal protection should not stop at rooting out discriminatory treatment of similarly situated women and men, but should also assure that implicitly male norms of the reproductive role are not unreflectively accepted as the measure of equality, thereby disadvantaging most women. When a man lacks control of his fertility, he does not typically experience it as a (negatively) life-shaping event to the extent that a woman ordinarily finds lack of control of hers. However inequitable and objectionable that may be, it has long been true and remains so. This argument thus requires not only equalizing the sexes' health benefits, but also doing so in a way that takes women's reproductive health needs as a benchmark.

Thus, with respect to reproductive distinctiveness, equality law should account for the burdens of bearing children and enduring the pervasive sex-role expectations of motherhood. Legal (and technological and cultural) treatment of reproductive capacity should permit women and men to participate in society as equals. As with sex education policy, treatment of contraceptive access should counteract stereotyped views of women as fated passively to accept motherhood, like sex, on terms advantageous to men. To that end, full and equal reproductive health benefits should be viewed as a requisite of sex equality, to enable all of us, women as well as men, to choose rather than be consigned to devoting our bodies and lives to the production and nurturance of the next generation.<sup>111</sup>

### III. WORK-FAMILY: AN EQUALITY RIGHT TO CARE, WITHOUT THE FEMINIZATION OF POVERTY

Unwanted pregnancy is not the only reason women seek abortions, and denial of the right to contraception or abortion is not the only way that reproductive justice is denied. People who want children, whether or not they initially intended to get pregnant, often realize they cannot responsibly carry a

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<sup>111</sup> See Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 61 (1971) (arguing, in classical liberal terms, that women, like men, should be left free from co-optation of their bodies for the support of others); EILEEN MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996) (drawing an extended analogy between pregnancy and physical assault, from which women are entitled to defend themselves using deadly force if necessary).

pregnancy to term.<sup>112</sup> They may be too poor, immature, or sick to raise a well-cared-for child; they may realize that raising a child would require them to leave school or lose a job needed to assure their own and their child's or children's support; or they may face opposition, estrangement, or abuse from a parent, spouse, or partner.<sup>113</sup> To the extent that sex discrimination intensifies the victimization or relative powerlessness of mothers, it enhances the need for abortion.<sup>114</sup>

Figuring out how to respond to those circumstances in a way that promotes both sex equality and the freedom to choose motherhood has been a complex and central challenge in both feminist theory and in the controversies over abortion rights. Crudely put, in feminist theory, cultural feminists have argued that women's equality requires valuing and supporting women where they are now—substantially involved in care giving—whereas liberal and dominance feminists have focused on efforts to move women to situations that provide greater access to the jobs and political power still dominated by men. Abortion controversy, too, intensifies over the extent to which the starting point is accepting maternity, planned or unplanned, or accepting women's entitlement to autonomy and choice about whether to carry or terminate a pregnancy.

The best responses combine the strengths of the different camps in the feminist and abortion debates. An overall work-family agenda should be informed by a cultural feminist recentering of social values—for men as well as women—toward taking care seriously and providing better public and private support for it. Work-family policy should also heed dominance feminism's insistence that economic resources, such as access to the paid labor market and social welfare benefits, are an indispensable ingredient of women's equal empowerment. The best work-family approaches adhere as well to liberal feminism's insistence on official sex-neutrality (e.g., expecting care from and offering family-friendly benefits to both sexes), and on the potential

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<sup>112</sup> See Shauna L. Shames & Joan C. Williams, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818, 822 (2004).

<sup>113</sup> *Id.* at 831 (citing Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 171 (1988)).

<sup>114</sup> See generally *id.* (arguing that women often seek abortions in order to enable them to be better mothers, either to existing or future children); Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 381, 390 (1995) (arguing that "abortion is a kind of mothering decision"); Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 23 (1992). This Article focuses on sex inequality, but racial inequality, too, is a major limiting force for people who would want to have children but feel they cannot without plunging themselves and their offspring further into poverty. See Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1036–37 (2004).



and freedom of men and women to defy gender stereotypes (e.g., men undertaking the burdens and joys of care). Finally, work-family policy could speak to both the “pro-choice” and “pro-life” agendas by, in all these ways, offering a genuine choice of parenthood. The long distances yet to be traveled in these directions mark the great need to protect reproductive rights; they underscore that we must guard not only women’s liberty and privacy rights to defend women’s bodily integrity against unwanted pregnancy, but also women’s equal protection rights against conscription to childbearing and motherhood—conditions that today remain deeply inequitable.

The Supreme Court has not only tentatively recognized the interplay between reproductive rights and sex equality, but also acknowledged the particular salience to inequality of women’s care-giving roles. The Court in *Hibbs* viewed widespread employment discrimination against women, stereotyped as caregivers, as evidence to support policy aimed at the reconciliation of work and family obligations.<sup>115</sup> *Hibbs* also helped parents who are—and are not just stereotyped as—caregivers by sustaining sex-neutral family and medical leave as a remedy for sex discrimination.<sup>116</sup> And, as noted above, the lead opinion in *Casey* makes the connection between women’s ability to participate as equals in society and their ability to control when and whether to have children.<sup>117</sup> *Casey*, like *Hibbs*, recognizes care giving for children as a major, life-shaping responsibility principally fulfilled by women.

An important next step toward egalitarianism and reproductive freedom in work-family policy is to place higher priority on social and economic support for caregivers, their dependants, and the caring relationship.<sup>118</sup> Whether the care is for their own or other people’s children, care giving is overwhelmingly done by women. If care of children were somehow magically assured, that assurance would break the links between women’s care for children, women’s relative economic marginalization in contrast to men, and the reproductive

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<sup>115</sup> Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003).

<sup>116</sup> *Id.* at 733–34.

<sup>117</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992) (joint opinion of O’Connor, Souter, and Kennedy, J.J., joined in relevant part by Blackmun and Stevens, J.J.).

<sup>118</sup> See Roberts, *supra* note 114, at 1043–52; EVA FEDER KITTAY, LOVE’S LABOR (1999) (theorizing supportive social responses to dependency as preconditions of sex equality); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES, (1995) (arguing that, in light of the centrality of children’s dependency and mothers’ nurturance, mother–child, rather than husband–wife, should be considered the core familial relationship); Robin West, *The Right to Care*, in THE SUBJECT OF CARE 88–114 (Eva Feder Kittay & Ellen K. Feder eds., 2002) (arguing for a legal right to give care to dependants without thereby becoming impoverished).

disempowerment of people otherwise discouraged from having children. There is a large and growing literature on the need for better work-family policy in the United States<sup>119</sup> and there appears to be support across the political spectrum for many such measures.<sup>120</sup> Affordable child care and universal public preschool,<sup>121</sup> extended school days,<sup>122</sup> paid family and medical leave, sick days and family days,<sup>123</sup> health care for all,<sup>124</sup> good-quality, part-time, and flex-time jobs with benefits,<sup>125</sup> a living wage,<sup>126</sup> removal of welfare "family caps,"<sup>127</sup> better tax benefits for parents, and a reversal of the trend toward longer work weeks<sup>128</sup> each would help to break down barriers to reproductive freedom and sex equality.

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<sup>119</sup> See, e.g., UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES (Jody Heymann & Christopher Been eds., 2005); JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY (2004); JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT (2003); WILLIAMS, *supra* note 106.

<sup>120</sup> See generally Alfred P. Sloan Foundation, Georgetown University Law Center, Workplace Flexibility 2010, <http://www.law.georgetown.edu/workplaceflexibility2010/index.cfm> (last visited Feb. 23, 2007).

<sup>121</sup> See generally EDWARD ZIGLER ET AL., A VISION FOR UNIVERSAL PRESCHOOL EDUCATION (2006); SUZANNE W. HELBURN & BARBARA R. BERGMANN, AMERICA'S CHILD CARE PROBLEM (2002). The issues of the sex inequalities and reproductive constraints on paid caregivers raise additional issues. Child care workers often work long hours for little pay, working during their client families' work hours plus commuting time for pay that generally comes out of the client's after-tax income. The client's money and time squeeze is passed on in amplified form to the childcare worker. She, in turn, is left with little time to be with her own children, and limited funds to pay for their care. The importance of child care work, and the market's inability to assure adequate compensation for it, should be recognized with greater public funding for such care. Gornick & Meyers, *supra* note 119, at 234.

<sup>122</sup> See, e.g., GORNICK & MEYERS, *supra* note 119, at 235; Lisa Demidovich, Expanding School Time as a Workplace Reform: Why Workplace Reformers Should Get Involved in the Massachusetts Expanded Learning Time Initiative (2006) (manuscript on file with author).

<sup>123</sup> GORNICK & MEYERS, *supra* note 119, at 112, 144-45; see, e.g., California's recent legislation funding family and medical leave through the state's unemployment compensation system. California Family Rights Act, CAL. GOV'T CODE §§ 12945.1, 12945.2, 19702.3 (2005); NAT'L P'SHIP FOR WOMEN & FAMILIES, WHERE FAMILIES MATTER: STATE PROGRESS TOWARD VALUING AMERICA'S FAMILIES (2006), <http://www.nationalpartnership.org/site/DocServer/WhereFamiliesMatter2005Report.pdf?docID=1056>.

<sup>124</sup> See, e.g., Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, 24 STUD. IN FAM. PLAN. 73, 74-75, 81-82 (1993).

<sup>125</sup> See GORNICK & MEYERS, *supra* note 119, at 183-84; Vicki Shultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1936-37 (2000).

<sup>126</sup> See, e.g., Schultz, *supra* note 125, at 1945-48.

<sup>127</sup> See, e.g., Roberts, *supra* note 114, at 1059-60; Shames & Williams, *supra* note 112, at 838. See generally SHARON HAYS, FLAT BROKE WITH CHILDREN (2003) (arguing generally against all forms of welfare caps).

<sup>128</sup> See JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 1-2 (1991) (arguing that despite the development of labor-saving technology, Americans are working ever-longer hours); ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 22 (1989) (studying heterosexual couples with children and concluding that, when housework and childcare are taken into account, mothers work a month per year more than fathers); ELIZABETH WARREN & AMELIA

Interestingly, pro-life as well as pro-choice advocates have picked up on the relationship between reproductive choice and support for family caregivers, understanding that if mothers had more ability to participate in society as equals, women might feel less need for abortion. Feminists for Life (FFL), a nonprofit organization declaring itself in favor of equality for women and against abortion, makes some claims that resonate with those of some pro-choice feminists, and which should be common ground in the reproductive rights battles.<sup>129</sup> According to FFL's mission statement, "[N]o woman should be forced to choose between pursuing her education and career plans and sacrificing her child."<sup>130</sup> The group describes its aim "to eliminate, through practical solutions, the root causes driving girls and women to abortion" by advocating "affordable housing and healthcare for new parents, fighting family caps in welfare reform, working for expansion of the Violence Against Women Act, and seeking better enforcement on child support."<sup>131</sup> FFL asserts that "women deserve better" than abortion, and urges an end to the "lack of practical resources and support" that make parenting so unthinkable for many women.<sup>132</sup>

Antiabortion and pro-choice feminists, as well as proponents of sex equality more generally, should support legal, political, and cultural changes that will enable women to bear children without sacrificing their futures. One

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WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 8–9 (2003) (arguing that two incomes are increasingly needed to support a family so that the loss of one income now puts families at greater financial risk than in the past, when middle-class fathers could earn a "family wage" and at-home mothers could get jobs to tide the family over economic rough patches).

<sup>129</sup> See, e.g., FFL's Frequently Asked Questions, <http://www.feministsforlife.org/FAQ/index.htm> (last visited Nov. 19, 2006) (explaining that FFL advocates better social support for mothers and favors greater legal restrictions on abortion); Shames & Williams, *supra* note 112, at 823 (critiquing, from a pro-choice perspective, shortfalls in support for mothering as making abortion more necessary).

<sup>130</sup> FFL's Mission, <http://www.feministsforlife.org/who/aboutus.htm> (last visited Nov. 19, 2006).

<sup>131</sup> Nina J. Easton, *Wife's Role in Women's Group Now in Focus*, BOSTON GLOBE, July 22, 2005, at A9.

<sup>132</sup> Feminists for Life, Jane Sullivan Roberts' Service to Women (2006), <http://www.feministsforlife.org/news/jsroberts.htm>. Other antiabortion activists recognize the connection between unplanned maternity and women's prospects in life, but cynically seek to deny rather than change that reality. Paul Swope argues that antiabortion advocates can reach young women more effectively if they depict women rejecting abortion, yet thriving economically and remaining in control of their lives. Paul Swope, *Abortion: A Failure to Communicate*, 82 FIRST THINGS 31 (1998). He analyses "extremely successful" antiabortion ads that send "the subliminal message" of empowerment by depicting young women who faced unwanted pregnancies yet eschewed abortion raking leaves in a nice suburban neighborhood as they send their children off to school or out jogging toward clearing skies. *Id.* Those images of middle or upper-middle class, married life with resources, leisure, and empowerment do not represent the facts for most young, single mothers. See, e.g., HAYS, *supra* note 127, at 179–81. The ads Swope admires cynically underplay the connection between reproductive control and women's life circumstances. They invert the reasoning of *Casey* to suggest that maternity does not in fact intensify sex inequality and thus can be restricted consistent with women's rights.

need not agree with FFL's claim that abortion is "never a solution" to the "problems faced by women"<sup>133</sup> to see that FFL has it right in linking feminism, reproductive freedom, and social support for care giving. The more society supports pregnant women and parents in meeting their care-giving duties, the more likely women will feel free to choose childbirth without fear of falling out of the ranks of society's equals. The potential for agreement about enhanced support for care giving among constituencies with widely divergent views of abortion seems promising.<sup>134</sup>

Social support for care giving implicates the workplace, welfare policy, and the organization of the family. In addition to being the primary family caregiver, most mothers—even those with very young children—work in the paid labor force, and the majority of them work full time. Joan Williams's pioneering work has argued that the workplace nonetheless remains designed around the model of an "ideal worker" who is implicitly male—a worker who, if he has children, is assumed to have a wife at home to care for them so that he comes to work unencumbered by family care obligations. Many standard features of the contemporary workplace date from a period of legally enforced, sex-based separate spheres, and have a disproportionate adverse impact on women. For example, workplace norms that insist on long, inflexible work hours, put a premium on "face time" or require routine travel are considered to be sex neutral. They are, however, biased against workers—disproportionately women—who also fulfill dependant care obligations. They are also increasingly ill-suited to contemporary reality in which parents of both sexes work, and fewer working parents of either sex have a homemaker spouse to free them from family care responsibilities.<sup>135</sup> People on all sides of the abortion debate who are committed to sex equality should support the idea of making work and family more readily reconcilable.

Work-family reforms aimed at alleviating gender bias, however, also create risks of intensifying it in a different form. Employers already see women as mothers or potential mothers with family care obligations and discriminate

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<sup>133</sup> Serrin M. Foster, *Feminists for Life of America, Women Deserve Better than Abortion* (2004), <http://www.feministsforlife.org/news/wdb%20smf.htm>. FFL seems to deny that the interests of women and fetuses do sometimes conflict and that its support for outlawing abortion denies women's moral agency. See Katha Pollitt, *Feminists for (Fetal) Life*, *NATION*, Aug. 29, 2005, at 13.

<sup>134</sup> See, e.g., *Reducing the Need for Abortion and Supporting Parents Act*, H.R. 6067, 109th Cong. (H.R., Sept. 13, 2006). H.R. 6067 is a bipartisan bill proposing, *inter alia*, support for new parents as a way to reduce the need for abortion. THIRD WAY CULTURE PROJECT, *REDUCING THE NEED FOR ABORTION AND SUPPORTING PARENTS ACT: A SUMMARY 1* (2006), [http://www.third-way.com/data/product/file/60/Act\\_Summary\\_final.pdf](http://www.third-way.com/data/product/file/60/Act_Summary_final.pdf).

<sup>135</sup> See WILLIAMS, *supra* note 106.

against them on the assumption that they do or will fall short of the ideal worker norm.<sup>136</sup> That kind of discrimination could worsen if employers expanded support for care in the ways just described, and if most of the employees who took advantage of the policies were women. If measures like paid family leave make employers view women in general as costlier, more cumbersome employees than men, work-family policies designed to help working parents will boomerang against working women.

That is one reason why the cultural feminist emphasis on supporting care and other “feminine” values and activities in which women have found fulfillment and happiness is not enough by itself to lead to sex equality; it needs to join liberal and dominance feminist strategies for equalizing women’s power and choices in traditionally male-dominated and defined spheres like the workplace.<sup>137</sup> Some of the boomerang effect of generous work-family policy might be avoided by government subsidization of family-friendly employment policies; if the government foots the bill, employer incentives to discriminate against women to avoid costly work-family accommodations are blunted. But social cost spreading alone does not remedy the whole problem.

Not only should family-friendly work opportunities be offered on a sex-neutral basis, but men, too, should be encouraged to take advantage of them.<sup>138</sup> Sex-role stereotyping is fed by strongly gendered patterns of group behavior, so that if employers see more women nurturing and more men running things, they will continue to associate femaleness with nurturance and maleness with leadership and to discriminate accordingly.<sup>139</sup> Sex-based disparate treatment

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<sup>136</sup> See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (confirming the existence of gender discrimination in the workplace based on the stereotype of women as caregivers); WILLIAMS, *supra* note 106, at 250.

<sup>137</sup> Mary Becker takes care to make a point, often lost in oversimplified efforts to distinguish strands of feminist thought, that “[r]elational [cultural] feminism does not reject either the equal treatment of similarly-situated women and men (formal equality’s focus) nor more power as it is currently defined (dominance feminism’s focus),” even as she emphasizes that cultural feminism “has a different focus.” Becker, *supra* note 23, at 48.

<sup>138</sup> Although men cannot get pregnant, give birth, or nurse, they can do everything else associated with care for dependant children. Thus, men can participate in the vast majority of family care work. Analyses of sex equality and parenting should start by decoupling all forms of family care which both men and women can do from pregnancy disability—the period when birth, and sometimes pregnancy, disables women uniquely from engaging in other activities like school or work.

<sup>139</sup> New research on social cognition has confirmed with neurological data that our brains absorb stereotypes, which impact our interpersonal and intrapersonal relations. See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181 (1995); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 954–58 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512–14 (2005).

of women in the workforce will persist as long as employers have reason to view women, and not men, as nonideal workers due to women's disproportionate burden of family care.<sup>140</sup>

Cultural norms must continue to shift to prompt men to be more involved in parenting, and those shifts occur slowly. Our sex-based assumptions are so ingrained that they feel natural, and become almost invisible. How routinely do employers ask female and not male employment applicants about children and childcare plans, without it occurring to them that such questions might amount to sex discrimination?<sup>141</sup> How many of us in our personal lives have responded to news that a heterosexual, working couple is expecting a child by inquiring or wondering about when, whether, and on what terms the woman will return to work after the baby comes—without likewise wondering about the man? We all live in the shadow of earlier generations. When heterosexual parents disagree about the fairness of the division of family and household care, the woman may feel resentful of her partner for falling short of doing fifty percent of the housework and family care, while the man may feel virtuous for doing so much more than his own father did. And to the extent that parenting requires supportive, nurturing, and empathic traits culturally associated with femininity, being observed as an involved father with a core caretaking role is bound to feel threatening to a man.<sup>142</sup> While employment

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<sup>140</sup> It is also important to employ men in the childcare field. Children who see only women as caregivers will inevitably grow up inculcated with stereotypes about sex and care giving.

<sup>141</sup> See WILLIAMS, *supra* note 106, at 207 (arguing that workplaces designed for the bodies and life patterns of men—without allowing time off for childbearing—illegally discriminate based on sex); see also, Moms Rising Petition, <http://www.momsrising.org/PA> (last visited Nov. 19, 2006) (petition supporting two Pennsylvania bills, H.B. 352 and S.B. 440, that would add language to the Pennsylvania Human Relations Act making it illegal for employers to ask these kinds of questions, suggesting such behavior is not already illegal).

<sup>142</sup> Becker's illuminating analysis, drawing on the work of sociologist Allan G. Johnson, explains male oppression of women as deriving less from men's desire to control women than from men's fear of other men and their concomitant drive for archetypal male attributes of control, power, autonomy, rationality, and strength. Becker, *supra* note 23, at 27. On that account, oppression of women is more a side effect than an objective of patriarchy. One function of women under patriarchy is to help to define and support the masculinity of "their men," in part through contrast:

Men are men to the extent that they are not women: masculine, independent, invulnerable, tough, strong, aggressive, powerful, commanding, in control, rational, and non-emotional. "Real women" (that is, middle- or upper-middle-class white women) are dependent, vulnerable, pliant, weak, supportive, nurturing, intuitive, emotional, and empathic.

*Id.* at 27 (citing ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 35 (1997)).

law can prompt some progress on these issues, the levers of change also need to extend to the law and culture governing family life.<sup>143</sup>

Many people assume—whether consciously or not—that even though men *can* nurture children, women like it more and are better at it. They think that it is unwise, counterproductive, probably futile, and not a necessary aspect of sex equality for men, on average, equally to contribute to family care. There are, however, substantial reasons to question those assumptions. As discussed in Part I, identification of male and female preferences and characteristics has long been bedeviled by the problem of adaptive preferences, making it difficult to distinguish what we really want from what legal and cultural role-typing have taught us to accept.<sup>144</sup> Substantial new research on gender and the brain have been viewed as added support for theories of hard-wired sex differences, but the data is complex and conflicting.<sup>145</sup> Moreover, nobody denies the substantial overlap between the neurological characteristics of the sexes as groups, nor contends that we should necessarily behave the way that we are “wired” to act.<sup>146</sup> Plus, even if all or most men *were* shown to be different in relevant respects from all or most women, different kinds of people can be very good parents—indeed, the liberty rights of parents to decide how to raise their children is founded on that notion.<sup>147</sup>

Over time, men may come to identify more strongly with their parental role so that fewer fathers opt out of care, more gay male couples raise children, and fewer mothers decide against co-parenting with men. The kinds of patriarchal attitudes that tolerate male abandonment of children to their mothers, and that discourage men—whether single or in couples—from being engaged and

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<sup>143</sup> See generally Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1993) (arguing that the gender wage gap appears to require legal intervention in the family and household structure and cannot be achieved by labor market policy alone).

<sup>144</sup> See *supra* note 15 and accompanying text.

<sup>145</sup> See STEVEN PINKER, *THE BLANK SLATE* viii (2002) (arguing that we underestimate the extent of neurological sex differences); Elizabeth S. Spelke, *Sex Differences in Intrinsic Aptitude for Math and Science: A Critical Review*, 60 AM. PSYCHOL. 950 (2005) (arguing that we overestimate the extent of neurological sex differences); *The Science of Gender and Science: Pinker vs. Spelke Debate*, Edge: The Third Culture, May 16, 2005, [http://www.edge.org/3rd\\_culture/debate05/debate05\\_index.html](http://www.edge.org/3rd_culture/debate05/debate05_index.html).

<sup>146</sup> For example, the propensity to engage in physical violence against other human beings may be “natural,” but organized societies nonetheless tightly regulate uses of force.

<sup>147</sup> See generally *Troxel v. Granville*, 530 U.S. 57, 63, 66 (2000) (acknowledging that “demographic changes of the past century make it difficult to speak of an average American family” and reaffirming parents’ fundamental right to make decisions concerning the “care, custody, and control” of their children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing the rights of parents and guardians “to direct the upbringing and education of children under their control” as an element of constitutional liberty that “excludes any general power of the state to standardize its children”).

nurturing parents, are gradually eroding.<sup>148</sup> So, too, the taboos against male child care workers may be softening.

Still, for many women, getting men involved in the care of their children is hopeless, irrelevant, or affirmatively unwelcome. Today, approximately one third of children in the United States live in single-parent families<sup>149</sup> and 90% of those are headed by women.<sup>150</sup> Many children are now raised by lesbian couples, and straight and lesbian women increasingly are choosing to become pregnant—through artificial insemination or otherwise—in circumstances that legally and socially exclude the sperm donor from having any paternal role. Even for these women, who may not have or particularly wish to have men involved in the care of their children, it is nonetheless important that the politics of care be seen as a men's issue, too. Social support for care giving is likely to be inadequate as long as care giving is thought to be women's domain and its conditions only a "women's issue." Women have always prioritized care and have needed support to do it well, but the experience of history shows that, without a politics of care that implicates men as well, women's needs are not a sufficiently high social priority. Even men who are not substantially involved in primary care giving should express their commitment to sex equality by actively supporting family-friendly law and policy.

In that regard, the pitch used by a new, energetic, internet-based grassroots campaign seeking a range of work-family reforms seems counterproductive. A coalition that calls itself "Moms Rising" promotes a policy agenda entitled "The Motherhood Manifesto," and consistently refers to the work-family policy needs, not of parents, but of "moms."<sup>151</sup> Part of the feminist effort to shift cultural norms toward more representative inclusion of traditionally "feminine" values appropriately affirms using language and imagery familiar

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<sup>148</sup> See Robert Pear, *Married and Single Parents Spending More Time with Children, Study Finds*, N.Y. TIMES, Oct. 17, 2006, at A12 (reviewing a new book by the Russell Sage Foundation and the American Sociological Association entitled *Changing Rhythms of American Family Life*, and observing that "the amount of child care and housework performed by fathers has sharply increased, researchers say in a new study, based on analysis of thousands of personal diaries").

<sup>149</sup> In 2005, 33% of children under 18 lived in single-parent homes. Forum on Family and Child Statistics, *America's Children in Brief: Key National Indicators of Well-Being* (2006), <http://www.childstats.gov/americaschildren/pop.asp>.

<sup>150</sup> Jacqueline Kirby, *Single Parent Families in Poverty*, 1 HUM. DEV. & FAM. LIFE BULL. 1, 1 (1995).

<sup>151</sup> Several of the organizations working in coalition with Moms Rising are likewise directed at mothers, not parents. Mainstreet Moms Operation Blue, Mothers and More, Mothers Movement Online, Mother: The Job, Mothers Ought to Have Equal Rights, and the National Partnership for Women and Families are some of the groups represented. See About Moms Rising, <http://www.momsrising.org/aboutmomsrising> (last visited Nov. 19, 2006).



and comfortable to women, as well as grassroots organizing techniques pioneered by and for women (e.g., at-home get-togethers at which children are welcome). But the public relations strategy here strongly signals that these are “women’s issues” without importance for men, and its bouncy tone hints that the organizations’ political work—like a girls’ night out—would really be a lot less fun if men were involved. To the extent that this approach gives men a pass, it should cause concern.

Further, claiming family issues as women’s political turf suggests that cultural feminists lack the courage of their convictions. The ethics and traits associated with femininity that cultural feminism champions are valuable enough that the entire society, not women alone, should aspire to fulfill them. The work of Carol Gilligan herself, whose *In a Different Voice* is viewed as an iconic work of cultural feminism, supports greater male involvement in family care giving. Although Gilligan generally associates distinct forms of moral reasoning with males and females, she is very careful to explain that these are only general typologies.<sup>152</sup> Her own conclusion is that moral growth for persons whose reasoning might be characterized as masculine would involve working to adapt moral insight more typically associated with the feminine, and vice versa.<sup>153</sup> In other words, Gilligan’s work suggests that it is beneficial for women and men both to strive for broader range in terms of their life values and experiences by learning more from the “opposite” sex.

An equality and reproductive rights agenda should thus focus on shifting the workplace away from the implicitly male “ideal worker” norm and toward an assumption that workers of both sexes have equal potential and responsibility as caregivers. It should advocate legal, political, and cultural changes that would share the burdens and joys of parenting and breadwinning more equitably between women and men. Men should not be let off the hook, whether on the micro level of care for children, or the macro level of pushing for legal and policy changes that better support care giving. By emphasizing the extent to which care for society’s dependants should be understood as a duty of men and women alike, equality analysis can help to make decisions to have children more realistic and responsible.

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<sup>152</sup> See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* 1–2 (1982).

<sup>153</sup> *Id.*

## CONCLUSION

Sex equality law is strong and dynamic, yet this Article points to some of the work it has yet to do. The hurdles identified here are not trivial. Equal protection doctrine has never been stronger in its condemnation of sex-based stereotypes, yet in the critical areas of teen sexuality and sex education, our culture, politics, and courts have yet to fully repudiate sex-based double standards. Promulgation of stereotypes in sex education should be treated as unconstitutional for the same reasons that equal protection rejects denial of opportunity based on stereotypes. Equal protection, properly understood, is not limited to redressing sex-based inequality of educational benefits or opportunities, but also forecloses efforts to shape youth behavior in stereotypically gendered ways. I have argued for sex education that overtly and comprehensively repudiates sexual double standards and the harms they help to foster and obscure, and embraces egalitarian social and sexual values.

The contraceptive equity example shows conflicts within our legal understandings of whether and how reproductive distinctiveness triggers sex discrimination. Competing strands of existing law treat disadvantage based on women's reproductive distinctiveness either as not sex based, or as sex discrimination only to the extent that it can be analogized to some male circumstance and thus conceptualized as nondistinctive after all. Equality analysis of contraceptive coverage suggests that the law should go further to support contraceptive equity, not only to make women's health insurance benefits as comprehensive as men's, but also to render women and men's reproductive distinctiveness equally nondisadvantaging. The law should do so by making women's reproductive health needs part of the baseline for coverage of facially sex-neutral benefit plans. Discrimination thrives where women have attributes—like distinctions in reproductive capacity—that make women seem differently situated from men. That is where *Geduldig*, broadly read, cuts equal protection off. If women as reproducing persons are equal to men, equality law must account for the circumstances and needs of women as normal, baseline human conditions.

Finally, the work-family conflict underscores how the law and society have hesitated to imagine, embrace, and support egalitarian parenting and work. We need, paradoxically, both greater and less recognition of mothering. Society should expand support for parents of both sexes, and exert cultural and institutional pressure on men to do their part. At the same time, women's second shift must not be recognized too much in the form of maternal-wall

stereotyping and discrimination, which overestimates the extent to which parenting interferes with women's workforce performance. Better support for care giving and erosion of sex stereotyping would both be facilitated if men participated, and were seen to participate, more in the direct provision and in the politics of care. Social support offered to "parents" but used by mothers is unlikely to be robust and risks intensifying sex discrimination. We disserve both sex equality and reproductive rights when we let work-family policy be cast as just a "women's issue."

We sometimes write or teach feminist legal theory as if its various strands are in conflict or mutually exclusive—suggesting that a legal thinker or a legal reform must be cultural, liberal, dominance, or postmodern feminist, but not all of them at once. Equality analyses of reproductive rights illustrate that the strands often work best together as a kind of cosmopolitan feminist theory, taking account of all available tools and modes of analysis and using the disparate approaches to cross-check and enrich one another. Dominance feminism has pointed out the importance of sites of sex subordination—like those examined here—that we might otherwise tend to miss, and the interconnections between disparate aspects of a patriarchal system, like sexuality, procreation, maternity, and work. This Article's three topics also underscore the importance of themes associated with liberal feminism—of describing and treating people evenhandedly and neutrally, without stereotyping, in part to reflect optimism about individual capacities to defy expectations, and to open the way concretely and imaginatively for society as a whole to become more equitable. Postmodern feminism, recognizing that gender is socially constructed and that language plays a major role in constructing it, also supports antistereotyping doctrine by helping, for example, to explain the harms of propagating sexual double standards, of naturalizing "mothering" as a female trait, and of describing work-family balance as a "women's issue." Postmodernism also has helped to uncover missing discourses of female desire and male vulnerability and shows that both men—especially gender nonconforming men—and women can be sexually victimized. Cultural feminism's embrace of values and needs traditionally associated with women and relegated to "feminine" spheres offers a crucial corrective to the law's tendency to define "neutrality" in terms that are implicitly male or male-privileging—whether they are standards of health coverage that exclude contraception, or a norm of the "ideal worker" assumed to be unencumbered by family care responsibilities. Cultural feminism seeks to shift the center of normative gravity in a "feminine" direction on issues of sexuality, procreation, family, and work. In short, dominance feminism shows

us why we are angry, liberal feminism keeps us hoping, postmodern feminism reminds us to think harder about who “we” are and could be, and cultural feminism teaches us that we must still trust our values and ourselves.

I have suggested here that equal protection and privacy are overlapping constitutional grounds for reproductive rights, and that reproductive rights, in turn, undergird sex equality. I have sought to do so with the aid of a range of analytic tools from feminist legal theory deployed in a cosmopolitan theoretical approach that I hope is stronger than the sum of its parts. All of these visions of sex equality and reproductive rights are ones that can be shared by people whether they view themselves as pro-life or pro-choice. If society were willing to recognize the demands of equality in these three areas, there might well be less need for abortion. Filling out the reproductive rights agenda with measures that make abortion less necessary is one way to seek progress, notwithstanding legal and cultural conflict about abortion itself. This Article has pointed out some uses of sex equality law to that effect.

Casting reproductive rights in terms of equality holds promise to recenter the debate towards the real stakes for women (and men) of unwanted pregnancy and away from the deceptive images of fetus-as-autonomous-being that the anti-choice movement has popularized since the advent of amniocentesis. Equality analysis may help to elaborate the price for women of existing reproductive law and policy. Another possibility, however, is that equality analysis of reproductive rights would change very little. If equality merely helps women to be as reproductively irresponsible as men, allowing women to have sex followed by abortions for unwanted pregnancy, women could have formally more equal sexual freedom but are unlikely to advance toward sex equality in the ways I call for here. Formalistic equality arguments narrowly focused on abortion could actually make substantive equality in areas like contraceptive access, work-family policy, and sex education harder rather than easier to achieve. As I noted at the outset, if abortion rights are viewed as making women more like men, such equalization might legitimate a status quo that fails to address the broader set of issues highlighted here. In the end, equality analysis of reproductive rights tells us as much about what more we might want from equality as it does about why reproductive rights are important.

Resorting to equality law—and an omnivorous approach to equality law at that—in support of reproductive rights is not just an opportunistic effort to find something that works. Effective, non-stereotyping sex education, full and

equal access to contraception, and jobs compatible with family care not only enhance reproductive freedom, but thereby promote sex equality. These measures are facets of the larger project of empowering women and men to become equal agents of our own sexual and procreative destinies. We all should be fully eligible for pleasure, safety, health, and—should we elect to have children—both parental intimacy and economic empowerment. The turn to equal protection as a source of law for reproductive rights is the right way to go because, in battles over reproductive rights, sex equality is so centrally at stake.

